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85-1793

SUPREME COURT OF THE UNITED STATES

CASE NO._____

October 1985 Term

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,

Petitioner,

v.

JIMMY LEE SMITH,

Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## AND APPENDIX

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## QUESTIONS PRESENTED FOR REVIEW

### ISSUE I

WERE RESPONDENT'S CONFESSIONS SUPPRESSIBLE SOLELY BECAUSE THEY WERE TENDERED DURING CUSTODIAL INTERROGATIONS CONDUCTED IN THE ABSENCE OF AND WITHOUT NOTICE TO COUNSEL WHOSE APPOINTMENT RESPONDENT HAD REQUESTED AT HIS POST-ARREST BUT PRE-ARRAIGNMENT FIRST APPEARANCE, EVEN THOUGH RESPONDENT WAS ADVISED OF HIS MIRANDA RIGHTS AND NEVER ALLEGED IN HIS PETITION THAT HE INVOKED HIS RIGHT TO COUNSEL IN RESPONSE TO THESE INTERROGATIONS?

### ISSUE II

MAY AN UNREBUTTED AFFIDAVIT FROM TRIAL DEFENSE COUNSEL NEGATE THE NEED FOR AN EVIDENTIARY HEARING INTO HIS ALLEGED INEFFECTIVENESS UPON PETITION FOR WRIT OF HABEAS CORPUS?

### ISSUE III

MAY THE SINGULAR, DELIBERATE AND STRATEGIC DECISION OF TRIAL DEFENSE COUNSEL NOT TO OBJECT TO THE ADMISSION OF A DEFENDANT'S CONFESSIONS CONSTITUTE "CAUSE" EXCUSING THE DEFENDANT'S RESULTING STATE PROCEDURAL DEFAULT UPON THE ADMISSIBILITY ISSUE, THUS PERMITTING FEDERAL HABEAS CORPUS LITIGATION OF THE MERITS OF THIS ISSUE ON GROUNDS

THAT THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL?

ISSUE IV

MAY A FEDERAL APPELLATE COURT ORDER A DISTRICT COURT EVIDENTIARY HEARING TO DETERMINE WHETHER A HABEAS CORPUS PETITIONER'S CONVICTIONS ARE INFIRM FOR REASONS OTHER THAN THAT FACTUALLY SPECIFIED IN HIS PETITION?

ISSUE V

MAY A FEDERAL APPELLATE COURT ORDER A DISTRICT COURT EVIDENTIARY HEARING TO DETERMINE WHETHER A DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER CRONIC WHERE THE RECORD CLEARLY DEMONSTRATES THAT THE ONLY CIRCUMSTANCES HINDERING COUNSEL'S PERFORMANCE WERE OF THE DEFENDANT'S OWN MAKING?

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## JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985) rendered November 14, 1985, rehearing and rehearing en banc denied February 25, 1986, pursuant to 28 U.S.C. §1254(1).[1]

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[1] Please see Appendix I for the text of this decision, and Appendix II for the text of the oral July 11, 1984 decision of the Federal District Court for the Northern District of Florida in Smith v. Wainwright, Case No. MCA 84-2095 (N.D. Fla. 1984; unreported), which this decision affirmed in part and reversed in part.

## CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED[2]

Amendments V, VI, and XIV (Section 1), Constitution of the United States.

Rules 17.1(a) and (c), Rules of the Supreme Court of the United States.

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[2] Please see Appendix III for the texts of these authorities.

## STATEMENT OF THE CASE AND FACTS

For purposes of framing the six legal issues presented in his petition for writ of certiorari, petitioner Louie L. Wainwright, Secretary of the Florida Department of Corrections, adopts the decision under review, Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), as his "statement of the case and facts," subject to the following corrections and/or additions:[3]

Wainwright rejects the Eleventh Circuit's factual conclusion that "[t]he record does not reflect precisely when

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[3] References to the seven volume record on appeal to be transmitted to this Court if certiorari is granted will be designated by the volume number followed by the page number(s); for example, "(V: 3, p. 247-251)." References to the nine lettered exhibits submitted by Wainwright below will be designated by the exhibit letter followed by the page number(s); for example, "(Ex: A, p. 2-3)."

[respondent Jimmy Lee] Smith made the alleged May 4 confession" and that it is therefore "entirely possible that Smith was arrested...before he made th[is first] confession,"[4] Smith v. Wainwright, 777 F.2d 609, 619. As the court elsewhere noted, "according to the complaints which [Jackson County Florida Sheriff Department Investigator Ron] Steverson filed charging Smith with the murders, the May 4, 1978 confession was the basis upon which Smith was arrested and charged with the murders," id., 777 F.2d 609, 618. The record contains no evidence that the informal murder charges preceded this first confession.

The Secretary also rejects the Eleventh Circuit's factual conclusion that "[w]ith-

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[4] Emphasis in original.

out [Smith's] confessions, conviction for first degree murder was probably impossible," id., 777 F.2d 609, 617. The Supreme Court of Florida explicitly found to the contrary on direct appeal:

> The state did not rely entirely on appellant's confession[s] to obtain...conviction[s]. There was evidence presented, other than appellant's confession[s], upon which the conviction[s] could be based. On Monday morning Bonnie Ward, Donna, and the two small children were in the Ward vehicle with defendant. They went to a hospital and visited another daughter, Dana, at about 11:30 a.m. Bonnie Ward was wearing her watch.
>
> In mid-afternoon defendant went to a bank and attempted to cash a check. He was alone in Bonnie's automobile. When a policeman approached, defendant fled in the car. After a high speed chase, he eluded the officer.
>
> On Tuesday defendant was arrested while hitchhiking. He had abandoned the vehicle, but had a knife and Bonnie's watch in his possession.
>
> On Wednesday the small child was able to communicate with the officers so that they were led

> to the scene of the crime [where the victims' brutalized bodies were discovered]. This evidence was sufficient to show, beyond a reasonable doubt, that defendant was with the victims at the time of the murder[s]. This, considered with the theft of the watch, possession of a knife suitable for use in committing the homicides, and the flight of the defendant, amounts to clear proof of the guilt of defendant.

Smith v. State, 407 So.2d 892, 898 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The state court's factual determination should control, 28 U.S.C. §2254(d). Moreover, as the Eleventh Circuit itself elsewhere noted, purportedly "the state had other overwhelming evidence of Smith's guilt" apart from his confessions which was not introduced at trial, Smith v. Wainwright, 777 F.2d 609, 616.

Petitioner would add that appointed trial defense counsel Herman D. Laramore's efforts to save Smith from the electric chair were severely impeded solely by his

client's lack of cooperation and death wish. The record reveals that Smith ordered his counsel not to contact his mother in pursuit of possibly mitigating evidence (EX: I, p. 7), rejected counsel's recommendation that he undergo extensive psychiatric testing (V: 3, p. 10-11, 28), ignored counsel's advice by repeatedly confessing to murders for which he was ultimately convicted (EX: I, p. 1-8), and actively sought the death penalty from the time of his apprehension through the time of his sentencing (V: 5, p. 637, 642, 658), even going so far as to voluntarily waive his right to the assistance of counsel at sentencing to beg the jury for a death recommendation (V: 5, p. 650-663, 704). See Smith v. State, 407 So.2d 892, 900.

Wainwright would add that respondent's collateral counsel never approached

Laramore concerning his prior representation of their client before filing a 28 U.S.C. §2254 petition for writ of habeas corpus in the Federal District Court for the Northern District of Florida charging him with ineffectiveness and unsuccessfully demanding an evidentiary hearing thereupon less than three full days before Smith's scheduled execution (V: 7, pp. 57-58). The defense consequently could not rebut the factual assertions tendered by Laramore concerning their relationship contained in Laramore's lengthy verified affidavit appended by Wainwright to his motion for summary judgment.[5]

The Secretary would further add that Smith specifically factually alleged in his largely conclusory petition that his

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[5] Please see Appendix IV for the text of this affidavit.

custodial confessions to Investigator Steverson should have been suppressed, and that Laramore was ineffective for failing to seek such suppression, only because his request for counsel at his May 5 first appearance on the as-yet formally unfiled murder charges should have been construed as the functional equivalent of the invocation of his right to counsel during all subsequent interrogations (V: 1, p. 153-154; 178-185).[6] Laramore explained in his affidavit that he elected not to move to suppress respondent's confessions both because respondent would not have co-

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[6] Please see Appendix V for copies of trial court documents concerning respondent's first appearances, arrests, waivers of the right to counsel, June 6, 1978 indictment for two counts of first degree murder, and August 28 pleas of not guilty to these charges at his Fla.R. Crim.P. 3.160 arraignment. These will be found in the record at (Ex: A, p. 1-4, 7, 23-24; Ex: I, p. 9).

operated in litigating any such motion, and also because he felt that the confessions were so pitiful that they might evoke the jurors to recommend that respondent's life be spared in sympathy for his otherwise lost cause. The prisoner was found in procedural default upon the merits of the suppression claim itself by the federal district court, and did not challenge this disposition upon appeal to the Eleventh Circuit.

## REASONS FOR GRANTING THE WRIT

Smith v. Wainwright evinces serious misunderstandings of important standards governing the admissibility of confessions, the evaluation of the competency of trial defense counsel, and the role of the federal judiciary in habeas corpus proceedings. If left uncorrected, these misunderstandings will seriously disrupt the efficient functioning of the criminal justice system within the jurisdiction of the Eleventh Circuit, and within the jurisdictions of other federal courts of appeals should they unwisely follow the decision below.

## ISSUE I

WERE RESPONDENT'S CONFESSIONS SUPPRESSIBLE SOLELY BECAUSE THEY WERE TENDERED DURING CUSTODIAL INTERROGATIONS CONDUCTED IN THE ABSENCE OF AND WITHOUT NOTICE TO COUNSEL WHOSE APPOINTMENT RESPONDENT HAD REQUESTED AT HIS POST-ARREST BUT PRE-ARRAIGNMENT FIRST APPEARANCE, EVEN THOUGH RESPONDENT WAS ADVISED OF HIS MIRANDA RIGHTS AND NEVER ALLEGED IN HIS PETITION THAT HE INVOKED HIS RIGHT TO COUNSEL IN RESPONSE TO THESE INTERROGATIONS?

## DISCUSSION

In Smith v. Wainwright, the Eleventh Circuit, citing prominently to Edwards v. Arizona, 451 U.S. 477 (1981) and Brewer v. Williams, 430 U.S. 387 (1977), held that defense counsel's 1978 decision not to move to suppress respondent's pre-arraignment confessions might constitute ineffective assistance in that these confessions were suppressible as taken in violation of both the Fifth and Sixth Amendments to the Constitution of the United States solely

because they were tendered during custodial interrogations conducted in the absence of and without notice to counsel whose appointment respondent had requested at his May 5 post-arrest first appearance, even though respondent was advised of his Miranda v. Arizona, 384 U.S. 436 (1966) rights and never even allegedly invoked his right to counsel in response to these interrogations.[7]

Not so.

The Eleventh Circuit's conclusion that respondent's confessions were possibly suppressible on Sixth Amendment grounds is based upon the legal misimpression that his "sixth amendment right to counsel clearly

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[7] As noted, the foregoing ground is the only one Smith specifically pled in urging that his confessions were suppressible and that Laramore was ineffective for failing to seek such suppression.

attached [either]...when he was arrested and charged with the murders at 5:00 p.m. on May 4" by Investigator Steverson, Smith v. Wainwright, 777 F.2d 609, 619, or following his request for counsel at his May 5 Fla.R.Crim.P. 3.131 (now 3.130 and 3.133) first appearance resulting from this arrest, id., 777 F.2d 610, 619. The Eleventh Circuit cited United States v. Gouveia, 467 U.S. 180 (1984) for these novel propositions, which is indeed ironic; in Gouveia, this Honorable Court held that "[t]he Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing." United States v. Gouveia, 467 U.S. 180, 187 (1984); see also Michigan v. Jackson, ___ U.S.___ (1986), 39 Crim.L.Rptr. 3001, 3002; Moran v. Burbine, _____U.S._____(1986), 38

Crim.L.Rptr. 3182, 3186; Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). This Court has "never held that the [Sixth Amendment] right to counsel attaches at the time of arrest," United States v. Gouveia, 467 U.S. 180, 188; neither does this right attach when a Florida criminal defendant is brought before a judicial officer within twenty-four hours of his arrest for a non-adversarial determination of probable cause or "first appearance" pursuant to Rule 3.131, as was done in this case. See Gerstein v. Pugh, 420 U.S. 103, 122 (1975), holding that "the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel;" see also Kirby v. Illinois, 406 U.S. 682, 687; Baker v. State, 202 So.2d 563 (Fla. 1967); Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977 (1983); Perkins v. State, 228

So.2d 382, 388-389 (Fla. 1969). Moreover, the mere fact that Smith had been initially arrested and incarcerated but not formally charged for the separate offense of forgery certainly did not vest him with a Sixth Amendment right to counsel concerning the as-yet formally uncharged murders. See United States v. Gouveia, 467 U.S. 180, 187; cf. Michigan v. Moseley, 423 U.S. 96 (1975). Respondent had no Sixth Amendment right to counsel for the State of Florida to violate until well after the last of his six challenged confessions was tendered - i.e., until he was formally charged by grand jury indictment with the two murders at issue on June 6, 1978, to which he pled not guilty upon his Fla.R.Crim.P. 3.160 arraignment on August 28. See Appendix V.

The Eleventh Circuit's conclusion that respondent's pre-arraignment confessions were possibly suppressible on Fifth

Amendment grounds because the predicate interrogations were conducted in the absence of and without notice to counsel is now clearly incorrect as a matter of law given his Miranda waivers of counsel's presence, Moran v. Burbine.

From the foregoing it is obvious that respondent's May 1978 confessions were not suppressible on either Fifth or Sixth Amendment grounds, and that Laramore consequently could not have been ineffective for failing to so move. The Eleventh Circuit's decision that the confessions were suppressible on either basis is predicated upon an expansive interpretation of when the right to counsel unwaivably attaches which is more than merely erroneous, but rather is the "smoking gun" which, by patently "conflict-[ing] with applicable decisions of this Court," Rule 17.1(c), Rules of the Supreme

Court of the United States, absolutely requires this Court's review. If left unrectified, the rule announced below will effectively preclude the elicitation of confessions from suspects within the jurisdiction of the Eleventh Circuit, which would not be sound public policy.

## ISSUE II

**MAY AN UNREBUTTED AFFIDAVIT FROM TRIAL DEFENSE COUNSEL NEGATE THE NEED FOR AN EVIDENTIARY HEARING INTO HIS ALLEGED INEFFECTIVENESS UPON PETITION FOR WRIT OF HABEAS CORPUS?**

## DISCUSSION

In Townsend v. Sain, 372 U.S. 293 (1963), this Court broadly held that where a petitioner for writ of habeas corpus pleads fact which, if true, would entitle him to relief, the recipient federal district court should ordinarily afford him an evidentiary hearing to prove his allegations. Id., 372 U.S. 293, 312-313. However, in Blackledge v. Allison, 431 U.S. 63 (1977), the Court clarified:

> This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing....[T]he district judge...may employ a variety of measures in an effort to avoid the need....As in civil cases generally,
>
> there exists a procedure

> whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment...Fed. Rules Civ. Proc. 56(e) and (f)....
>
> Moreover,...under Rule 7 [of the Rules Governing Habeas Corpus Cases, 28 U.S.C.A. (1977 Supp.)], the judge can direct expansion of the record to include any appropriate materials that "enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing...[A]ffidavits may be submitted and considered as a part of the record."

Id., 431 U.S. 63, 80-83; see also Vasquez v. Hillery, 474 U.S.____, 88 L.Ed.2d 598 (1985). In the landmark competency of counsel case of Strickland v. Washington, 466 U.S. 668 (1984), this Court rejected the notion that the imposition of a death sentence upon a state prisoner constitutes prima facie evidence of the ineffective

assistance of trial counsel sufficient to compel relitigation of the case via an evidentiary hearing upon ineffectiveness in a federal district court, to wit:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client....
>
> Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice suffers as a result....
>
> The state courts properly concluded that the ineffectiveness claim was meritless without

holding an evidentiary hearing. Id., 466 U.S. 668, 690, 697, 700. And in Barefoot v. Estelle, 463 U.S. 880 (1983), this Court, in expressly holding that the federal appellate courts may adopt "summary procedures" to review the merits of motions for stays of execution strategically filed at the eleventh hour, necessarily implied that similarly-situated federal district courts enjoy a corresponding power. Id., 463 U.S. 880, 889.

To Wainwright, Blackledge, Strickland and Barefoot collectively modify Townsend by establishing that the government's submission of an unrebutted affidavit from trial defense counsel adequately explaining his challenged actions negates any need for a full-blown evidentiary hearing into his alleged ineffectiveness upon a petition for writ of habeas corpus. This should be

particularly true when the petition is accompained by a motion for a stay of execution strategically filed by a capital prisoner at the eleventh hour. In most such cases, counsel's affidavit will readily confirm the frivolity that the timing of such a prisoner's filings and the state court record presumptively suggest. This was certainly the case here, where counsel, who was alleged to be ineffective primarily for failing to move to suppress unsuppressible and nonessential confessions, explained in an unrebutted and unrebuttable affidavit that his client would not have cooperated with any such attempt and that the confessions themselves were so pitiful as to have the reasonable strategic possibility of invoking a life recommendation from the jury in sympathy for respondent's otherwise lost cause. See Appendix IV and Curry v. Wilson, 405 F.2d

110 (9th Cir. 1968), cert. denied sub. nom. Curry v. Nelson, 397 U.S. 973 (1970).[8] But the Eleventh Circuit dismissed the power of the foregoing law and logic with the offhand comment that the assertions contained in Laramore's Blackledge-authorized and unrebutted affidavit were "a far cry from assertions made under circumstances which subject them to probing cross-examination." Smith v. Wainwright, 777 F.2d 609, 618. The appellate court wants Laramore to stand trial for his

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[8] Ironically, by unsuccessfully pleading below that the State of Florida had violated Brady v. Maryland, 373 U.S. 83 (1963) by allegedly withholding "mitigat[ing]" statements made by his mother which "would have corroborated statements which he made in the May 6 videotaped confession," Smith v. Wainwright, 777 F.2d 609, 613, Smith unwittingly conceeded that Laramore's decision that the admission of his confessions could have had a sympathetic impact was sound.

representation of Smith even though Strickland says he should not.

The Eleventh Circuit's decision on this score is demonstrably "in conflict with applicable decisions of this Court," Rule 17.1(c), thus meriting this Court's discretionary review. Such review is alternatively warranted because the propriety of relying upon affidavits in all habeas corpus proceedings in lieu of costly, dilatory and pointless evidentiary hearings upon the competency of trial counsel presents "an important question of federal law," Rule 17.1(c), requiring validation in one comprehensive decision by this Court. If the Court does not so act, Wainwright's economical and customarily successful practice of relying upon affidavits from defense attorneys whose competence is challenged in the federal district courts, see e.g. Hosie v. Massey,

105 F.D.R. 426 (N.D. Fla. 1984), appeal denied, ____F.2d____ (11th Cir. 1985), Case No. 84-3573, will necessarily and undesirably give way to expensive evidentiary hearings at which the defense, in order to replace the invariably unhelpful state court record with something favorable, will understandably seek to refashion rather than reveal the truth about counsel's performance.

## ISSUE III

**MAY THE SINGULAR, DELIBERATE AND STRATEGIC DECISION OF TRIAL DEFENSE COUNSEL NOT TO OBJECT TO THE ADMISSION OF A DEFENDANT'S CONFESSIONS CONSTITUTE "CAUSE" EXCUSING THE DEFENDANT'S RESULTING STATE PROCEDURAL DEFAULT UPON THE ADMISSIBILITY ISSUE, THUS PERMITTING FEDERAL HABEAS CORPUS LITIGATION OF THE MERITS OF THIS ISSUE ON GROUNDS THAT THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL?**

## DISCUSSION

In Wainwright v. Sikes, 528 F.2d 522 (5th Cir. 1976), the Eleventh Circuit's ancestor held that a Florida prisoner who claimed that his confession was involuntary due to intoxication, and hence improperly admitted against him at trial, was entitled to a federal court evidentiary hearing to evaluate this contention even though he had failed to so argue at trial as required under Florida law. Upon certiorari, this Court

reversed, holding that the defendant's state procedural default upon the confession issue precluded federal review thereof absent a showing of both "cause" for this default and "prejudice" resulting therefrom. Wainwright v. Sykes, 433 U.S. 72 (1977). In Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983), cert. denied, 464 U.S. 922 (1983), the Eleventh Circuit, following the precedent of Washington v. Estelle, 648 F.2d 277 (5th Cir. 1981), see also Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. denied, 464 U.S 914 (1983) and Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985), held that "[a]llegations of ineffective assistance of counsel are insufficient to constitute the requisite cause" to permit federal review of a procedurally defaulted issue, implicitly if belatedly and temporarily

recognizing that adoption of the contrary approach would effectively circumvent the dictates of Wainwright v. Sykes. And in Strickland v. Washington, this Court harmoniously confirmed that the effectiveness of defense counsel must be assessed by considering the totality of the circumstances surrounding his performance rather than one particular act or omission, see also Nix v. Whiteside, _____U.S._____(1986), 38 Crim.L.Rptr. 3143, stressing in so holding that not every cry of ineffectiveness will suffice to compel relitigation of state trials via federal court evidentiary hearings as noted, Strickland v. Washington, 466 U.S. 668, 690, 697, 700. Compare McMann v. Richardson, 397 U.S. 763 (1970), holding that a defendant who pled guilty on the reasoned strategic advice of counsel will

not later be automatically entitled to an evidentiary hearing to prove that his plea was involuntary as the product of a suppressible coerced confession which was not challenged only due to the ineffective assistance of counsel; see also Engle v. Isaac, 456 U.S. 107, 133 (1982), holding that "the Constitution...does not insure that defense counsel recognize and raise every conceivable constitutional claim;" cf. Jones v. Barnes, 463 U.S. 745 (1983), holding that appellate defense counsel may not be found ineffective for declining to raise every conceivable nonfrivolous issue upon appeal.

In Smith v. Wainwright, the Eleventh Circuit clearly and unmistakably departed from the foregoing precedents by determining that defense counsel's singular and deliberate decision not to object to the admission of respondent's confessions

could constitute "cause" excusing respondent's resulting and conceeded state procedural default upon the admissibility issue, thus permitting federal litigation of that issue under the guise of alleged ineffective assistance of counsel.[9]

The appellate court's significant misapprehension of the applicable

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[9] As noted, the court took this action notwithstanding that a defense motion to suppress respondent's confessions would have been demonstrably unsuccessful under both the prevailing then-existing and current federal and Florida law, notwithstanding that the confessions were not critical to respondent's fate, and also notwithstanding that Laramore's stated and reasonable strategy in pragmatically acquiescing to the admission of his obstinant client's pathetic inculpations was to invoke juror smypathy, see Curry v. Wilson. Thus, the court's homage to the axiom that "the reasonableness of trial counsel's failure to move to suppress the confessions...must be viewed in the light of the circumstances at the time of his decision," Smith v. Wainwright, 777 F.2d 609, 617, was hollow.

precedents and de facto resurrection of the overruled Wainwright v. Sikes in its decision creates "conflict with applicable decisions of this Court," Rule 17.1(c), as well as "conflict with the decision[s] of [other] federal court[s] of appeals ...(and) with a state court of last resort," Rule 17.1(a), thus meriting this Court's discretionary review. If the Court does not so act, the contemporaneous objection rule of Wainwright v. Sykes will have no meaning in the many courts under the jurisdiction of the Eleventh Circuit, thus destroying the valuable concepts of orderliness and

finality in litigation therein.[10]

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10 Wainwright would emphasize that the importance of the question of whether a single oversight or omission of defense counsel may constitute "cause" excusing the defendant's resulting procedural default on a given issue is highlighted by this Court's acceptance of certiorari jurisdiction to resolve this question in Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1984), affirmed on rehearing, 754 F.2d 520 (4th Cir. 1985), cert. granted sub. nom. Sielaff v. Carrier, ___U.S.___ (1985), 37 Crim.L Rptr. 4097, in which the State of Florida has filed an amicus brief arguing for a reaffirmance of Wainwright v. Sykes; see also Morrison v. Kimmelman, 752 F.2d 918 (3rd Cir. 1985), cert. granted, ___ U.S.____ (1985), 38 Crim.L.Rptr. 4014. Certainly the importance of this question alone likewise augurs for a grant of certiorari in this case.

## ISSUE IV

MAY A FEDERAL APPELLATE COURT ORDER A DISTRICT COURT EVIDENTIARY HEARING TO DETERMINE WHETHER A HABEAS CORPUS PETITIONER'S CONVICTIONS ARE INFIRM FOR REASONS OTHER THAN THAT FACTUALLY SPECIFIED IN HIS PETITION?

## DISCUSSION

28 U.S.C. §2242 requires that a habeas corpus petitioner must plead the "facts" which he believes entitle him to legal relief. "Although [pro se] habeas corpus petitions must be read liberally, the petition must still set forth substantive facts that enable a court to perceive a real possibility of constitutional error." Logsden v. Rose, 401 F.Supp. 820, 821 (E.D. Tenn. 1975). Conclusory allegations are a wholly insufficient predicate for any award of federal habeas corpus relief. Cuddy, Petitioner, 131 U.S. 280 (1889). These precepts have been applied to bar federal

review over conclusory allegations that a state prisoner's confession was admitted at trial in violation of his constitutional rights. Grove v. Wilson, 368 F.2d 414 (9th Cir. 1968), citing to Townsend v. Sain. The rationale permitting liberal construction of habeas corpus pleadings has no applicability where the movant is represented by well-qualified counsel.[11] See generally Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983), cert. denied sub. nom. Jones v. McKaskle, 466 U.S. 976 (1984).

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[11] See Henry, W., "Representation of Death Sentenced Inmates," Florida Bar Journal, Vol. LIX, No. 11, p. 53-56, December 1985, in which Chief Judge Godbold of the Eleventh Circuit, a member of the panel below, is twice cited as praising the performance of those civil lawyers who enlisted in the Florida Bar's project to represent death row inmates collaterally, of which current defense counsel were the charter members; and Blankenship, G., "Lawyers Finding Death Row Work Demanding," Florida Bar News, Vol. 12, No. 10, p. 4, May 15, 1985.

In remanding this cause for an evidentiary hearing to determine whether respondent's confessions were suppressible for reasons other than that factually specified in his petition - i.e. that his request for counsel at his pre-indictment first appearance precluded any further questioning in counsel's absence as refuted previously - the Eleventh Circuit significantly contravened the foregoing principles. The court stated that "the evidentiary hearing we mandate calls for a 'who said what to whom and who did what, when' inquiry," Smith v. Wainwright, 777 F.2d 609, 620; these are simply not joined issues in this case. Wainwright is confident that if Smith felt Investigator Steverson initiated their conversations, or did not properly Mirandize him before taking his statements, or took these statements through coercion or in violation of his right to remain

silent, current counsel would certainly have so pled. Surely it is not the proper function of a federal appellate court to plead a habeas corpus petitioner's facts for him. Cf. Thomas v. Arn, ___U.S.___, 88 L.Ed.2d 435 (1985); Hill v. Lockhart, U.S.____, 88 L.Ed.2d 263 (1985); compare Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). Rather, such a court's "function...is clearly limited to reviewing that which had been presented to the District Judge." Johnson v. Havener, 534 F.2d 1232, 1234 (6th Cir. 1976). The Eleventh Circuit's decision to the contrary creates both a reviewable "conflict with the decision of another federal court of appeals," Rule 17.1(a), and "an important question of federal law which has not been, but should be, settled by this Court," Rule 17.1(c). If this Court does not soundly reject the Eleventh Circuit's expansive

view of the federal judiciary's role in the habeas corpus process, the many courts under the latter's jurisdiction will hereinafter be wastefully required to order evidentiary hearings every time a habeas corpus petitioner baldly pleads "my confessions were improperly admitted at trial and my lawyer was incompetent for not moving that they be suppressed." Moreover, in such an eventuality, the government would be placed in the untenable position of having to prove the prisoner's confessions admissible against every possible challenge years after the fact, when memories may have faded or witnesses died.

## ISSUE V

MAY A FEDERAL APPELLATE COURT ORDER A DISTRICT COURT EVIDENTIARY HEARING TO DETERMINE WHETHER A DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER CRONIC WHERE THE RECORD CLEARLY DEMONSTRATES THAT THE ONLY CIRCUMSTANCES HINDERING COUNSEL'S PERFORMANCE WERE OF THE DEFENDANT'S OWN MAKING?

## DISCUSSION

In United States v. Cronic, 466 U.S. 648 (1984), this Court held that in a few limited cases, the untoward circumstances surrounding defense counsel's performance may be so patently insurmountable that counsel's furnishment of ineffective assistance to the accused may be presumed. Insofar as the Court had earlier held that a defendant may waive his right to the assistance of counsel altogether, Faretta v. California, 422 U.S. 806 (1975), clearly the Cronic rule was not intended to apply to situations where counsel's per-

formance was hindered solely by a pervasive lack of cooperation from his client. No, Cronic was explicitly designed to protect the rights of systemically victimized defendants such as the "Scottsboro Boys," see Powell v. Alabama, 287 U.S. 45 (1932), and was not implicitly designed to similarly protect justifiably guilt-ridden defendants such as respondent from exercising their rights to indulge in informed if indirect self-euthenasia. In Martin v. Rose, 744 F.2d 1245, 1251 (6th Cir. 1984), the Sixth Circuit, by noting in the course of evaluating a Cronic claim that such would be uncompelling if the defendant either explicitly or implicitly had waived his right to the effective assistance of counsel, recognized this truth.

In remanding this cause for an evidentiary hearing to determine whether Smith

received ineffective assistance of counsel under Cronic at both the guilt phase of his trial, where he tried to waive his right to the assistance of counsel implicitly, and at the sentencing phase, where he waived this right explicitly, the Eleventh Circuit in its decision creates "conflict with applicable decisions of this Court," Rule 17.1(c), as well as "conflict with the decision of another federal court of appeals on the same matter," Rule 17.1(a), thus meriting this Court's discretionary review. If this Court does not so act, the Eleventh Circuit's decision will have the effect of encouraging other capital defendants not to cooperate with their lawyers, with potentially drastic consequences for both.

## ISSUE VI

**IS THE DECISION BELOW SUCH AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?**

## DISCUSSION

The decision below was rendered by a federal appellate court which rules favorably to the defense in fully one-half of those cases involving state-court affirmed death sentences which come before it. Henry, W., "Representation of Death Sentenced Inmates," Florida Bar Journal, Vol. LIX, No. 11, p. 53-56, December 1985, at 53. Are the state courts really so inept at detecting preserved constitutional infirmities in such cases that they can do no better than meet the law of averages, or does the Eleventh Circuit second-guess the judgment of the state courts much too frequently? This Court's recent experiences

suggest the latter possibility. See, e.g., Wainwright v. Goode, 464 U.S. 78 (1983); Strickland v. Washington; and Wainwright v. Witt, 469 U.S.___, 83 L.Ed.2d 841 (1985).

In the name of "justice [which], though due to the accused, is due to the accuser also," Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.), the Eleventh Circuit's decision in Smith v. Wainwright merits the same reversal which befell its decisions in Goode, Strickland and Witt. As demonstrated, Smith v. Wainwright evinces serious misunderstandings of important standards governing the evaluation of the competency of trial defense counsel, the admissibility of confessions, and the role of the federal judiciary in habeas corpus proceedings. Specifically, this decision orders an evidentiary hearing to determine if defense counsel was ineffective for strategically

declining to raise a solitary and clearly unmeritorious claim concerning respondent's confessions, thereby implying contrary to this Court's precedents that counsel must contentiously press every conceivable constitutional claim on behalf of his client, even those standing no reasonable chance of success. The decision assumes factors favorable to the defense which were not even pled, i.e., that respondent may have invoked his right to remain silent in response to his several interrogations-while overlooking factors favorable to the government, i.e., the obvious truth that a client's pervasive lack of cooperation with his lawyer, in this case bordering on sabotage, is pertinent to any assessment of the latter's effectiveness. The decision clearly constitutes such an extreme "depart[ure] from the accepted and usual course of judicial proceedings...as to call

for an exercise of this Court's power of supervision," Rule 17.1(a). If the Court is not disposed to grant plenary review, a summary reversal on grounds that the Eleventh Circuit misapplied the aforediscussed precedents, with or without a remand to that court, would certainly be acceptable to Wainwright.

## CONCLUSION

WHEREFORE petitioner, Louie L. Wainwright, as Secretary of the Florida Department of Corrections, hereby respectfully submits that this Honorable Court should GRANT his petition for writ of certiorari and REVERSE that portion of the Eleventh Circuit's decision mandating an evidentiary hearing into the competence of trial counsel with directions that the decision of the Federal District Court for the Northern District of Florida denying all relief be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a total of three true copies of the foregoing Petition for Writ of Certiorari have been forwarded to Ms. Sarah M. Bleakley, Attorney for Respondent, 1529 Coombs Drive, Tallahassee, FL 32308, Mr. Julian Clarkson and Mr. Gregg D. Thomas, Attorneys for Respondent, P.O. Box 1288, Tampa, FL 32206, by U.S. Mail, this 14th day of April, 1986.

John W. Tiedemann
Assistant Attorney General

# APPENDIX

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**APPENDIX I**

Copy of the Decision under Review, Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), rehearing and rehearing en banc denied February 25, 1986

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

- - - - - - - - - - - - -

NO. 84-3448

- - - - - - - - - - - - -

JIMMY LEE SMITH,

Petitioner/Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent/Appellee.

Sarah M. Bleakley, Tallahassee, Fla., Gregg D. Thomas, Holland & Knight, Tampa, Fla., Julian Clarkson, Tallahassee, Fla., for petitioner-appellant.

John Tiedemann, Asst. Atty. Gen. of Florida, Tallahassee, Fla., for respondent-appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

- - - - - - - - - - - - - - - - - - -

(November 14, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this capital case, we review the district court's dismissal of appellant Jimmy Lee Smith's petition for writ of habeas corpus. We reverse and remand for an evidentiary hearing.

FACTS

On May 3, 1978, in Jackson County, Florida, law enforcement officers found the bodies of Bonnie Myrle Ward and her twelve-year old daughter, Donna Lynn Strickland. Their deaths occurred as the result of multiple stab wounds.

On May 1, 1978, the appellant, Jimmy Lee Smith, aroused the suspicions of a bank teller when he attempted to cash a check drawn on another bank. Although law enforcement officers responded promptly and chased the vehicle Smith was driving, he

evaded capture.

The next day, law enforcement officers found the vehicle abandoned. The vehicle belonged to Bonnie Myrle Ward. The same day on which law enforcement officers found the abandoned vehicle, they arrested Smith and charged him with forgery. Pursuant to a search incident to Smith's arrest, law enforcement officers seized a pocket knife and a ladies' watch. The watch was identified at trial as that of Bonnie Myrle Ward.

Upon arrival at the jail, Smith requested to speak to a lawyer. An assistant public defender, Herman D. Laramore, was at the jail and conferred with Smith. At the conclusion of their conversation, Laramore advised Smith that he should make no statements to law enforcement officers.

On May 3, 1978, when Smith appeared for

his first appearance hearing on the forgery charges, the court appointed the public defender's office to represent him. Later that day, Ron Steverson of the Jackson County Sheriff's Department telephoned Laramore and advised him that the bodies of Ward and Strickland had been found and that Smith was a prime suspect in those murders. Upon this notification, Laramore again visited Smith in the jail and advised him not to make any statements to law enforcement officers.

That same day, Steverson questioned Smith about the homicides in the absence of, and without prior notification to, Smith's counsel. After the interrogation, Steverson advised Laramore that he had interrogated Smith.

The next day, May 4, 1978, law enforcement officials arrested Smith for the Ward and Strickland murders. In the

absence of, and without prior notification to Smith's counsel, Steverson again interrogated Smith. This time Smith confessed to both homicides. After taking the confessions, Steverson notified Laramore.

On May 5, 1978, Steverson filed complaints against Smith for the murders of the two victims. At his first appearance on the murder charges, Smith signed an acknowledgement of rights form and requested the appointment of counsel.

Over the next several days, Smith made five additional statements: both an oral and a written confession on May 5, a videotaped confession on May 6, a written confession on May 9, and a written confession on May 16.

PROCEDURAL HISTORY

On June 6, 1978, a grand jury indicted Smith for the murders of Ward and Strick-

land. After pleading not guilty to each count, Smith was tried before a jury and convicted of both murders. On November 12, 1981, on mandatory appeal, Smith's convictions and sentences were affirmed. Smith v. State, 407 So.2d 894 (Fla. 1981) (Smith I). The United States Supreme Court denied Smith's petition for writ of certiorari. Smith v. Florida, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). On February 5, 1983, following a clemency hearing, the Governor of Florida signed a death warrant for Smith's execution.

On March 9, 1983, without conducting an evidentiary hearing, the state trial court denied Smith's petition for post-conviction relief brought pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The Florida Supreme Court affirmed the state trial court's denial of relief.

Smith v. State, 445 So.2d 323 (Fla. 1983) (Smith II). The United States Supreme Court then denied Smith's second petition for writ of certiorari. Smith v. Florida, ____ U.S. ____, 104 S.Ct. 2671, 81 L.Ed.2d 375 (1984). During the pendency of the state proceedings, pursuant to 28 U.S.C.A. § 2254 (West 1977), Smith filed a habeas corpus petition in the federal district court. On March 11, 1983, the federal district court ordered a stay of Smith's execution, but one month later, dismissed the habeas corpus petition, without prejudice.

On June 15, 1984, the Governor of Florida issued a second death warrant ordering Smith's execution. On July 9, 1984, the state trial court dismissed Smith's second motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The

Florida Supreme Court affirmed that judgment on appeal. Smith v. State, 453 So.2d 388 (Fla. 1984) (Smith III).

On July 9, 1984, Smith filed his second federal habeas corpus petition. On July 11, 1984, without an evidentiary hearing, the district court dismissed Smith's petition and denied his request for a certificate of probable cause to appeal.

On July 12, 1984, pursuant to 28 U.S.C.A. § 2251 (West 1971), this court granted Smith's emergency motion for stay of execution and issued a certificate of probable cause to appeal. Smith v. Wainwright, 737 F.2d 1036 (11th Cir. 1984).

## ISSUES

Smith makes three claims for relief on appeal: (1) that he was denied his sixth amendment right to an impartial jury in violation of Witherspoon v. Illinois, 391

U.S. 510, 89 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (2) that the state of Florida withheld exculpatory information relevant to the issue of mitigation in the penalty phase of his trial, in violation of the teachings of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (3) that he was denied his sixth amendment right to the effective assistance of counsel at both the guilt-innocence and penalty phases of his trial. Additionally, Smith contends that an evidentiary hearing is necessary to determine factual issues necessary to resolution of the issues he raises on appeal.

## DISCUSSION

### I. Witherspoon Claim.

Smith contends that his sixth amendment right to an impartial jury was violated by the exclusion for cause of three prospec-

tive jurors because of their opposition to capital punishment, in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Smith alleges that the issue of whether a prospective juror was improperly excused on the basis of his opposition to the death penalty is a mixed question of law and fact; therefore, this court is not bound by the state nor the district courts' resolution of this issue.

Smith interprets Witherspoon to permit exclusion of a juror for cause only if the juror makes it "unmistakably clear" that he would automatically vote against the imposition of the death penalty. Witherspoon, 391 U.S. at 522 n.21, 88 S.Ct. 1777 n.21. Smith alleges that the state's questions on voir dire were not adequately formulated to determine whether a prospective juror could set aside his

personal beliefs regarding the death penalty and abide by his duty to apply the law to the facts as presented. He also contends that the prospective jurors' responses to the state's inquiries as to their convictions about the death penalty were so ambiguous that it is difficult to discern whether they could have in fact set aside their personal beliefs and applied the law to the facts as presented in this case.

The state contends that Smith is in procedural default on the Witherspoon issue; therefore, we are precluded from addressing the issue on the merits. In the alternative, the state argues that this issue presents a question of fact entitled to a presumption of correctness; therefore, we are bound by the state court's determination that Witherspoon was not violated.

At the outset, we address the state's argument that Smith defaulted on this claim. Although Smith raised the Witherspoon issue before the state courts and the federal district court, the state contends that Smith is in procedural default because he did not raise before those courts the grounds which he now urges before this court.

We find that the substance of the Witherspoon claim was presented to both the state courts and the district court. This is all that is required. Pickard v. Conner, 404 U.S. 270, 278, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Hutchins v. Wainwright, 715 F.2d 512, 519 (11th Cir. 1983), cert. denied, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984). Moreover, the state courts and the federal district court addressed this issue on its merits;

consequently, this issue is properly before us.

In Wainwright v. Witt, ____ U.S. ____, 105 S.Ct. 844, 83 L.Ed. 841 (1985), the United States Supreme Court held that the determination of a juror's bias against imposition of the death penalty is a question of fact entitled to a presumption of correctness under 28 U.S.C.A. § 2255 (d).[1] Witt, ____ U.S. at ____, 105 S.Ct.

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[1] Title 28 U.S.C.A. §2254(d) provides:

> (d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall

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at 853-56.[2]

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> be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;
> > (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
> > (3) that the material facts were not adequately developed at the State court hearing;
> > (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> > (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(Cont'd on next page)

On direct appeal, the Supreme Court of

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> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been

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Florida concluded that the three prospective jurors' representations that under no circumstances would they vote to sentence a person to death, were sufficient to justify their excusal under Witherspoon. Smith I, 407 So.2d at 899. Smith, to prevail on this issue, must overcome the Witt

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> made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

[2] We note that the district court and the parties did not have the benefit of Witt. Witt was not decided until after the parties had submitted their appellate briefs to this court.

presumption of correctness.

Witt reaffirms the test first enunciated in Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), "as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Witt, _____ U.S. at _____, 105 S.Ct. at 851-852 (footnote omitted) (quoting Adams, 448 U.S. at 45, 100 S.Ct. at 2526). The prospective jurors in this case stated that under no circumstances would they vote for imposition of the death penalty. These responses were sufficient to meet the test for excusal under Witt.

Both the fact-finding process and the

development of the material facts were adequate in this case. Accordingly, we are bound by the state court's findings of fact and conclude that the three prospective jurors were properly dismissed for cause.

II. Brady Claims.

Smith also contends that the state violated his fifth amendment right to due process by withholding two pieces of allegedly exculpatory evidence relevant to the issue of mitigation in the penalty phase of his trial, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state argues that we are bound by the Florida Supreme Court's finding that Smith is in procedural default on both these claims. Smith concedes that the Florida Supreme Court found him to be in procedural default on these claims, but contends that the state court's discussion

of the merits of these claims waives any procedural default and permits us to address the claims on their merits.

The federal district court agreed with the state court's finding that Smith was in procedural default on these claims, but held in the alternative, that because the material at issue involved Smith's own life story of which he was aware, he had failed to state a claim for relief under Brady.

A.

Smith's first Brady claim relates to statements which his mother made to state officials concerning his troubled childhood. Smith alleges that these statements would have corroborated statements which he made in the May 6 videotaped confession and would have added evidence in mitigation. The Florida Supreme Court held that Smith failed to

properly present this claim because the allegations in support of the claim were not submitted in the form of a sworn motion, as is required by Rule 3.850 of the Florida Rules of Criminal Procedure. Smith II, 445 So.2d 326.

Had the Florida Supreme Court stopped at that point, this would be a much easier issue to resolve because we are bound to follow a state court's application of its procedural rules. The Florida Supreme Court went on, however, to hold:

> Moreover, even if [Smith's] Brady claim had been preserved and even if we were to consider the merits of this claim, we would have to hold that it is insufficient as a matter of law. Brady requires that the defendant not be aware of the evidence before or during trial. Arango v. State, 437 So.2d 1099 (Fla. 1983). The information contained in the affidavit was obviously available to [Smith] and to trial counsel insofar as it involves [Smith's] own life story.

Smith II, 445 So.2d at 326 (emphasis added). Smith relies upon this language and Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983), in urging us to reach the merits of these claims.

Dobbert presented a situation analogous to that with which we are confronted here. In that case, however, the state court first rejected the petitioner's claim on the merits and then proceeded to find that he was in procedural default on the claim.

We stated in Dobbert that a state court's rejection of a claim both on the merits and on the ground of procedural default "might well give the federal court the option to refuse to review the merits of the issue because of a state court procedural default." Dobbert, 718 F.2d at 1525. Although in Dobbert we chose to address both the issue of procedural default and the merits of the petitioner's

claim, we conclude that that approach is not necessary in this case.

Dobbert reaffirmed the general rule that "where a state court clearly and correctly applies a procedural default rule, Sykes requires the federal court to abide by the state court's decision even though the state court discusses the merits as an alternate ground for rejecting a claim." Dobbert, 718 F.2d at 1524 (citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). In a case where the state court finds the petitioner in procedural default, yet proceeds to discuss the merits of the petitioner's claim, our task is to determine the actual basis of the state court decision. Dobbert, 718 F.2d at 1524-25; Radcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979).[3]

It is clear from the language of the Florida Supreme Court's opinion that the basis of its denial of relief on this claim was the procedural irregularity in the manner in which the allegations supporting the claim were submitted to the state trial court.[4] In addressing Smith's second Brady

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[3] Decisions of the Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit until overruled by this court sitting en banc. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

[4] The Florida Supreme Court's discussion of Smith's first Brady claim began:

> The state argues, first of all, that this issue should not be considered by this Court because it was contained in an unsworn motion contrary to the requirements of the Florida Rules of Criminal Procedure. See Florida Rules of Criminal Procedure 3.850. The trial court refused to consider this issue on this basis and we agree that the trial court was procedurally precluded from giving this issue consideration.

(Cont'd on next page)

claim, the Florida Supreme Court reaffirmed that it had rejected the first Brady claim "because of procedural irregularities." Smith III, 453 So.2d at 389.

Accordingly, we hold that the Florida Supreme Court denied Smith relief on this Brady claim on the grounds of procedural default; therefore, we are precluded from addressing this issue on its merits. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As we held in Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984):

> A state court is entitled to express its view on federal constitutional issues without waiving its procedural default rules.

B.

Smith's seccnd Brady claim relates to reports of psychiatric evaluations which

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Smith II, 445 So.2d at 326.

Smith underwent while he was institutionalized at the Arthur Dozier School for Boys. Smith raised this claim in his second petition for post-conviction relief. The state trial court dismissed Smith's petition "on the grounds that this successive 3.850 motion is an abuse of the post-conviction process." The Florida Supreme Court affirmed the dismissal of the petition stating:

> We agree. All of the six points raised by Smith are issues which were or could have been raised on direct appeal and thus are foreclosed from consideration under post-conviction relief.

Smith III, 453 So.2d at 388 (citation omitted).

Again, however, the Florida Supreme Court discussed the merits of Smith's claim. In so doing, it relied upon its disposition of Smith's first Brady claim:

> We rejected [Smith's first] Brady claim because of

> procedural irregularities but went on to note that the claim was without merit because 'Brady requires that the defendant not be aware of the withheld evidence before or during trial' and the allegedly withheld evidence 'was obviously available to [Smith] and to the trial counsel insofar as it involves [Smith's] own life story.' Smith II at 326. For the same reason we now reject Smith's similar claim.

Smith III, 453 So.2d at 389 (emphasis added).

Consistent with our analysis of the Florida Supreme Court's disposition of Smith's first Brady claim, we conclude that the Florida Supreme Court denied Smith relief on this second Brady claim on the ground of procedural default. Therefore, we are precluded from addressing Smith's second Brady claim on its merits.

Smith has failed to demonstrate cause for his failure to abide by the state's procedural rules and any resulting

prejudice therefrom. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[5]

## III. Ineffective Assistance of Counsel Claim.

Smith's primary claim is that his trial counsel was constitutionally ineffective at

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[5] Even if we were to agree with Smith's analysis of this issue and reach the merits of his Brady claims, we would still have to deny him relief. "Brady does not require the government to turn over information which, 'with any reasonable diligence, [the defendant] can obtain himself.'" Jarrell v. Balkcom, 735 F.2d 1242, 1258 (11th Cir. 1984) (quoting United States v. Campagnulo, 492 F.2d 852, 861 (5th Cir. 1979)).

Both Smith's traumatic childhood and his institutionalization at the Arthur Dozier School for Boys are obviously part of his life history and, therefore, are matters of which Smith should be aware. Moreover, the psychological report prepared by two court-appointed psychologists makes references both to Smith's turbulent childhood and institutionalization at the Arthur Dozier School for Boys. Contrary to his argument here, Smith was obviously cognizant of this information.

both the guilt-innocence and penalty phases of his trial, and that he is entitled to an evidentiary hearing to develop material facts relative to this claim.

A. Analytical Framework.

The burden is on Smith in this habeas corpus proceeding to establish the need for an evidentiary hearing. Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984); Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984). Our threshold inquiry in determining whether Smith has met that burden is to "determine whether [his] allegations, if proved, would establish the right to habeas relief." Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963).

In evaluating a habeas corpus petitioner's request for an evidentiary hearing, we must "consider the allegations

of the [petitioner's] habeas petition and supplement the petition with those facts undisputed on the record below." Birt, 725 F.2d at 591. Having reviewed the allegations set forth in Smith's habeas corpus petition and the few undisputed facts of record and concluded that those allegations, if true, are sufficient to state a constitutional violation, we proceed to determine whether the material facts were adequately developed in the state court, and, if they were not, whether the failure to develop the material facts is attributable to Smith's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

B. Standard of Review.

Smith raised the ineffective assistance of counsel issue in his first motion for state post-conviction relief. After a non-

evidentiary hearing, the state trial court denied Smith relief on the ground that he had "expressed complete satisfaction with the performance of his trial counsel." The Florida Supreme Court affirmed the denial of relief, but on the ground that Smith failed to demonstrate that he was prejudiced by his trial counsel's alleged errors. Smith II, 445 So.2d at 325.

The issue of whether Smith received ineffective assistance of counsel is a mixed question of law and fact. Strickland [v. Washington], 466 U.S. 668, at ____, 104 S.Ct. [2052, at] 2070, 80 L.Ed.2d [674] at 700; Douglas v. Wainwright, 714 F.2d 1532, 1554 (11th Cir. 1983). Therefore, we are not bound by the finding of either the state court or the district court that Smith received effective assistance of counsel.

C. Application.

As a general rule, a habeas corpus petitioner must allege specific errors in his counsel's performance to support a claim for ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984). Where, however, a petitioner demonstrates that circumstances surrounding his representation give rise to a presumption of prejudice, he will prevail. United States v. Cronic, 466 U.S. 648, ___ n.20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657, 666-67 n.20 (1984); Warner v. Ford, 752 F.2d 622, 624-25 (11th Cir. 1985) (distinguishing Martin v. Rose, 744 F.2d 1245, 1250-51 (6th Cir. 1984)). Smith relies upon both standards, in the alternative.

1. Strickland.

Strickland enunciates a two-part test

for determining whether a defendant has received ineffective assistance of counsel. The inquiry under the first prong of the test focuses upon the counsel's performance:

> The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Strickland, 466 U.S. at _____, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

Under the second prong of the test, the defendant must prove that he was prejudiced by his counsel's alleged deficient performance:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

> would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome . . . When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.

Strickland, 466 U.S. at _____, 104 S.Ct. at 2068-2069, 80 L.Ed.2d at 698.

Strickland held that

> [a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at _____, 104 S.Ct. 2069-2070, 80 L.Ed.2d at 699. The district court addressed the prejudice prong first, we likewise address the prejudice prong of the test first.

The primary alleged error upon which Smith premises his ineffective assistance of counsel claim is that his trial counsel failed to move to suppress Smith's numerous confessions. This failure to move to suppress the confessions was extremely prejudicial to Smith.

Smith's trial counsel decided that Smith had "no valid defense." Smith's trial counsel's affidavit stated that the state had other overwhelming evidence of Smith's guilt, but produced only enough evidence for conviction.[6] Yet, Smith's

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[6] The state submitted to the district court an affidavit of trial counsel. There is some dispute among the parties as to the weight to be given the trial counsel's affidavit. In the district court, Smith objected to the submission of the affidavit because he did not have an opportunity to respond to it as is required by the local rules of civil procedure. The district court expressly recognized Smith's concern. The district court stated, "For purposes of summary judgment proceedings
(Cont'd on next page)

confessions provided the primary evidence offered and the only evidence which the state needed to convict him of first degree murder.

It appears from the present record that defense counsel's failure to challenge the

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obviously Mr. Smith's attorneys have not had an opportunity to at least respond to that affidavit in some way, but I find that the affidavit is properly filed with the court. But I'm not going to consider it for purposes of ruling either on a motion to dismiss or motion for summary judgment." (Emphasis added.)

The state argues that Smith raised the issue of the submission of the affidavit for the first time in his reply brief to this court. On this ground, the state moved the court to strike Smith's reply brief. Because this issue was raised and ruled upon by the district court, we deny the state's motion to strike Smith's reply brief.

Although the affidavit was not relied upon by the district court, Smith relies upon the affidavit because it "is informative and advisory of the role played by [Smith's] trial counsel and his insight into various issues." We agree and also rely upon the affidavit to demonstrate the need for development of material facts relevant to Smith's ineffective assistance of counsel claim.

admissibility of the confessions eliminated the need for the state to submit any other evidence. The confessions placed Smith in victim Ward's automobile; the confessions placed Smith at the scene of the murders; the confessions identified the murder weapon and put it in Smith's hand. Without the confessions, conviction for first degree murder was probably impossible. Only the confessions told the circumstances under which the stab wounds were inflicted. The confession also provided the only evidence of premeditation. Moreover, the confessions contained vivid details of the murders and of Smith's feeling of satisfaction at having committed the crimes. Smith also confessed to having committed several other crimes, including murder and numerous rapes.

The Supreme Court has expressly stated: "[E]ven when no theory of defense

is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." United States v. Cronic, 466 U.S. 648, ____ n. 19, 104 S.Ct. 2039, 2045-46 n. 19, 80 L.Ed.2d 657, 666 n.19 (1984). Being merely a spectator to the state's presentation of evidence will not meet the standard for effective assistance of counsel.

Because Smith's trial counsel failed to move to suppress the confessions, the state's case was not subjected to the meaningful adversarial testing which is required under our system of justice. On the present record, we find that Smith suffered prejudice because of this failure.

Having concluded that Smith was prejudiced by his trial counsel's failure to move to suppress Smith's numerous confessions, the only issue on remand is

whether trial counsel's performance was reasonable under the performance prong of Strickland.

Under the performance prong of Strickland, the burden of proof is upon Smith to "overcome the [strong] presumption that, under the circumstances, [his trial counsel's failure to move to suppress the numerous confessions] 'might be considered sound trial strategy.'" Strickland, 466 U.S. at _____, 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

The reasonableness of trial counsel's failure to move to suppress Smith's several confessions depends upon whether trial counsel conducted a reasonable investigation into the merits of such a motion, or whether he made a reasonable decision that such an investigation was

unnecessary. Strickland, 466 U.S. at ____, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. The reasonableness of trial counsel's failure to move to suppress the confessions is a factual issue which must be viewed in light of the circumstances at the time of his decision. Strickland, 466 U.S. at _____, 104 S.Ct. 2066, 80 L.Ed.2d at 695.

Neither the state court nor the federal district court made any findings as to whether Smith's trial counsel's failure to move to suppress the confessions constituted "sound trial strategy." No evidence exists in the record that trial counsel conducted any investigation into the merits of a motion to suppress Smith's confessions. Trial counsel does, however, cite two rationales in support of the reasonableness of his decision not to conduct such an investigation. These rationales are presented in an unanswered

affidavit. Assertions in affidavits are a far cry from assertions made under circumstances which subject them to probing cross-examination.

Trial counsel contends that he did not move to suppress Smith's confessions because such a motion "would have been frivolous." Trial counsel arrived at this conclusion based upon the fact that Smith had twice disregarded his instructions not to make any statements to the authorities, that Smith had signed several waiver forms, and that Smith would not have cooperated in litigating the motion to suppress because of his close relationship with Steverson. Trial counsel also gives as a reason for not moving to suppress the confessions the fact that Smith made no complaints of threats or coercion, or of promises having been made in consideration for his confessions. These proffered rationales

for failing to move to suppress Smith's confessions raise several important factual questions.

First, we note that Smith's May 4, 1978, confession was never introduced into evidence nor even mentioned at trial.[7] Thus, we know nothing about the circumstances surrouding Smith's first confession. The fact that the confession was not admitted into evidence does not negate the need for such an inquiry. Although the Supreme Court has never held that the inadmissibility of a confession automatically precludes the admission into evidence of subsequent statements, it has held that subsequent confessions must be

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[7] Yet, according to the complaints which Steverson filed charging Smith with the murders, the May 4, 1978, confession was the basis upon which Smith was arrested and charged with the murders.

excluded where the coercion surrounding the first statement had not dissipated at the time of the subsequent statements. United States v. Bayer, 331 U.S. 532, 541, 67 S.Ct. 1394, 1398-99, 91 L.Ed.2d 1654 (1947); see also, Oregon v. Elstad, _____ U.S. _____, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (where initial confession voluntary, voluntariness of subsequent statements depends upon whether they were knowingly and voluntarily given); and Leon and Wainwright, 734 F.2d 770, 772-73 (11th Cir. 1984) and cases cited therein.

Smith was in custody at the time that Steverson approached him on May 4, 1978, and questioned him about the Ward and Strickland homicides. Thus, the question arises as to whether Steverson properly advised Smith of his fifth amendement rights to remain silent and to the presence of an attorney, as required under Miranda

v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Even if Smith was advised of his rights, the question still remains whether he invoked any of those rights. We note that Smith did request appointment of a lawyer immediately after he was arrested on the foregery charges and brought to the jail. If Smith did invoke his right either to remain silent or to the presence of an attorney, the question then becomes "whether his 'right to cut off questioning' was 'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975) (footnote omitted) (quoting Miranda, 384 U.S. at 479, 86 S.Ct. at 1630).

If Smith's request the questioning cease was honored, it is clear that Steverson subsequently resumed the questioning. Under these facts, the

question then becomes who initiated the subsequent interrogation. Oregon v. Bradshaw, 462 U.S. 1039, 1043-46, 103 S.Ct. 2830, 2833-35, 77 L.Ed.2d 405, 411-12 (1983); Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981). If Smith initiated the subsequent interrogation, the question remains whether Smith knowingly and voluntarily waived his right to have counsel present during that interrogation. Bradshaw, 462 U.S. at 1044-1047, 103 S.Ct. at 2834-36, 77 L.Ed.2d at 412-13; Edwards, 451 U.S. at 486 n.9, 101 S.Ct. at 1885 n. 9.

Smith alleges that he was denied his sixth amendment right to counsel, as well. The first factual question under sixth amendment analysis is at what point did Smith's right to counsel attach. See, e.g. United States v. Gouveia 467 U.S.

180, ____, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146, 153-54 (1984).

Adversarial judicial proceedings were initiated against Smith when he was arrested and charged with the murders at 5:00 p.m. on May 4. Smith's sixth amendment right to counsel clearly attached at that point. Gouveia, 467 U.S. at ____, 104 S.Ct. at 2297, 81 L.Ed.2d at 153-54.

The record does not reflect precisely when Smith made the alleged May 4 confession. It is entirely possible, however, that Smith was arrested and that, consequently, his sixth amendment right to counsel had attached, before he made the confession. In any event, Smith's sixth amendment right to counsel had undoubtedly attached by the time of his May 5 statements, the earliest of the confessions admitted at trial. Smith was clearly entitled to have an attorney present during

the May 5 interrogations and may have been entitled to have an attorney present during the May 4 interrogation, as well. Brewer v. Williams, 430 U.S. 387, 389, 401, 97 S.Ct. 1232, 1235, 1240-41, 51 L.Ed.2d 424 (1977).

It is important to note that Smith's sixth amendment right to counsel did not depend upon his requesting that an attorney be present. Brewer, 430 U.S. at 404, 97 S.Ct. 1242. Once Smith's right to counsel attached, Steverson could not properly interrogate Smith in the absence of counsel, unless Smith knowingly and voluntarily waived that right.

The central inquiry then, under both fifth amendment and sixth amendment analysis, Tinsley v. Purvis, 731 F.2d 791, 794 (11th Cir. 1984), becomes whether there was "an intentional relinquishment or abandonment of a known right or

privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1937). The question of wavier is a mixed question of law and fact. Brewer, 403 U.S. at 403-04, 97 S.Ct. at 1241-42. Two underlying factual inquiries remain to be resolved: (1) whether Smith understood his right to have an attorney present and (2) whether, with that understanding, he voluntarily relinquished that right.

There has been no adversarial testing of the voluntariness of Smith's other confessions. Although the trial court admitted the confessions on the grounds that they had been freely and voluntarily given, the trial court was not called upon to analytically assess whether the confessions had been knowingly and voluntarily made. Trial counsel repeatedly stated that he had no objection to the admission of the confessions. Therefore,

the trial court simply summarily accepted the state's submission that the confessions had been freely and voluntarily given.[8]

Trial counsel stated that on two occasions before May 4, he advised Smith

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[8] In making these representations, the state relied upon the testimony of Steverson. Steverson testified that before each confession he advised Smith of his rights and Smith signed a waiver-of-rights form. While a waiver-of-rights form is not determinative of the issue of waiver, we note that the state produced only two forms: one for the written statement of May 5 and one for the written statement of May 16.

We also note that Laramore failed to cross-examine Steverson. Apparently fearing that Laramore might object to the admissibility of the confessions, the state requested that Steverson be voir dired about the confessions outside of the presence of the jury. Laramore also failed to question Steverson at that stage in the proceedings. Laramore knew that Steverson had developed an unusually close relationship with Smith, yet he chose not to delve into the nature of that relationship, or to attempt to ascertain how the relationship developed and the nature of the conversations between Steverson and Smith, which preceded Smith's confessions.

not to make any statements to the police. Trial counsel also had several conversations with Steverson. What did they talk about? What instructions, if any, did trial counsel give Steverson regarding the questioning of Smith? If he gave no instructions, why not? The record is silent on these important matters. Cf. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (police interrogated defendant, despite defendant's counsels' repeated request that defendant not be questioned unless they were present).

These are but a few of the factual questions which must be resolved before we can address the issue of whether Smith received ineffective assistance of counsel at the guilt-innocence phase of his trial.

Although the evidentiary hearing which we mandate calls for a "who said what to

whom and who did what, when" inquiry, the district court must be, as we are, mindfu of the powerful and important principles under consideration in this case. Only a clear and certain waiver by Smith combined with a clear and reasonable choice by Smith's trial counsel can prevent the finding that Smith's right to effective assistance of counsel, as guaranteed by the Constitution, has been denied.

2. Cronic.

Smith also urges us to find that his trial counsel's overall performance was so deficient that prejudice should be presumed under the standard enunicated in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).[9]

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[9] Smith contends that his trial counsel was deficient in several respects,
(Cont'd on next page)

Cronic represents a narrow execption which the Supreme Court has carved out of the general rule that a petitioner claiming ineffective assistance of counsel must demonstrate that he was prejudiced by specific alleged errors in his counsel's performance, Chadwick v. Green, 740 F.2d

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including: (1) failing to conduct an adequate voir dire of prospective jurors consistent with the precepts of Witherspoon v. Illinoisd 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (2) failing to investigate and present evidence of Smith's mental state at the time of the alleged murders; (3) failing to inform the trial court that Smith had attempted suicide while in jail pending trial, and that pursuant to a physician's instructions, Smith was taking psychotropic medication while awaiting trial, and of other evidence tending to show that Smith was incompetent; (4) failing to request a competency hearing under Pate v. Robinson, 383 U.S. 375 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); (5) failing to investigate and present mitigating evidence at the penalty phase of Smith's trial; and (6) stipulating to the admission of a videotaped confession of Smith clothed in prison garb during the penalty phase, in violation of the precepts of Estelle v. Williams, 425 U.S. 501, 504 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976).

897, 900 (11th Cir. 1984). Consequently, the burden of proof under Cronic is a very heavy one. We have yet to find that a petitioner received ineffective assistance of counsel under the Cronic standard based solely upon counsel's performance, without regard to some interference attributable to the state. See, e.g., Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). We have, however, implicitly recognized that counsel's tactical decision to stand silent and not participate in a defendant's trial may constitute ineffective assistance of counsel under the Cronic standard. Warner v. Ford, 752 F.2d 622, 624-25 (11th Cir. 1985).

Prejudice is presumed under the Cronic analysis. The emphasis, therefore, is upon the circumstances under which counsel performed or whether counsel performed in a truly adversarial manner. Here, as under

the Strickland analysis, the facts must be more fully developed before we can determine whether Smith has met his burden of proof under Cronic.

The failure to develop the relevant material facts cannot be attributed to any neglect or bypass on Smith's part. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983). Both Smith and the state requested an evidentiary hearing on the ineffective assistance of counsel claim before the state court. Smith also requested an evidentiary hearing before the federal district court.

We reverse the judgment of the district court denying Smith relief on the ineffective assistance of counsel claim and remand the action for an evidentiary hearing to develop the material facts relevant to the claim. If trial counsel's decision not to move to suppress the

confessions was unreasonable, the district court should grant the writ of habeas corpus.

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 84-3448

---

JIMMY LEE SMITH,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

---

Appeal from the United States
District Court for the
Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion November 14, 1985, 11 Cir., 198__, ____ F.2d ____).

(Feb. 25, 1986)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

**PER CURIAM:**

( X ) The Petition for Rehearing is DENIED

and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 84-3448

---

JIMMY LEE SMITH,

Petitioner-Appellant

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

---

Appeal from the United States
District Court for the
Northern District of Florida

---

O R D E R:

( X ) The motion of appellee, Louie L. Wainwright for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 1, 1986, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon

the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

**APPENDIX II**

Copy of the July 11, 1984
Oral Order of the Federal District
Court for the Northern District
of Florida, Smith v. Wainwright,
Case No. MCA 84-2095 (N.D. Fla.
1984, unreported), affirmed in part
and reversed in part by the decision
under review

IN THE FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

PANAMA CITY DIVISION

JIMMY LEE SMITH,

Petitioner,

vs. MCA 84-2095

LOUIE L. WAINWRIGHT,

Respondent.

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RULING OF THE COURT AT HEARING

Hon. Roger Vinson
U.S. District Judge
Pensacola, Florida
July 11, 1984

APPEARANCES:

Ms. Sarah Bleakley
(Of Spriggs & Warren)
Attorney at Law
Tallahassee, Florida
Appearing on behalf of the petitioner.

Mr. Gregg Thomas
(Of Holland & Knight)
Attorney at Law
Tampa, Florida

Appearing on behalf of the petitioner.

Mr. John W. Tiedemann
Assistant Attorney General
for the State of Florida
Tallahassee, Florida
Appearing on behalf of the respondent.

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THE COURT: Because of the urgency of the matter I'm going to go ahead and announce my opinion and rule from the bench. I will attempt to set out my reasoning as best I can extemporaneously here as we go through. The court reporter will take this down and it will be available as the order of the court. Anything that is included in this will be construed as the court's findings of fact and conclusions of law as appropriate and, of course, the ruling will be, for purposes of taking this matter to the Eleventh Circuit or higher appeal, we'll have to rely upon what Mr. Suda takes down.

What I propose to do is address the issues as they have been numbered by the attorneys, working in reverse order, looking first at the last six issues which were raised in a 3.850 motion relatively recently and only ruled upon by the Supreme Court of Florida yesterday in its opinion of July 10, 1984.

Specifically these points are, number seven, a denial of the defendant's Sixth Amendment right to a fair trial because the prosecution was allowed to challenge for cause all jurors unwilling to vote for the death penalty. And in reliance upon the case of Grigsby vs. Mabry Mr. Smith contends that the jury which convicted him was not representative of a cross-section of the community, to the extent that this procedure had eliminated persons from the venire panel who did not believe in the death penalty and would not vote for a

sentence of death if they were selected as jurors.

There is some question in my mind as to whether this is a case that ought to be within the scope of Wainwright vs. Sykes, since the issue in Grigsby was one that has only relatively recently surfaced and was certainly not one that was readily available to be brought out in the initial appeal of the 1978 trial and, quite frankly, I'm not sure that, if it was available to be brought out in the initial post-conviction motions of 1983.

It's my conclusion that it probably is within the category of the matters barred by the principle of Wainwright vs. Sykes but in the alternative I find that from the evidence available to me in the record and the intertwining nature of this argument with the Witherspoon argument I do not find that on the basis of only three individual

challenged on this basis that it would have constituted any significant disruption of a cross-section of the community to the extent that it would constitute a constitutional violation of Sixth Amendment rights.

So, both on the Sykes case, that it was barred because it was not timely raised as required, or in the alternative on the substantive evaluation of it, I find that it has no merit.

Point number eight maintains that the sentencing phase of the trial was rendered fundamentally unfair by inflammatory comments made during the prosecutor's closing argument aimed at inciting the passions and the religious fears of the jury.

I have very carefully read over the closing argument of Mr. Jones, who was the State Attorney involved in this case, and

he does frequently refer to matters of religious preference and activity, but I find that they fall short of being anything that would be construed as inflammatory comments of a constitutional nature. And in the alternative, this is obviously a matter that should have been raised and could have been raised in the initial appeal. So in any event it falls within the principles of Wainwright vs. Sykes, and again should be denied for purposes of this habeas corpus petition.

Number nine has to do with a challenge to the standard set out under Florida law as an aggravating circumstance; that is, that the term "especially heinous, atrocious and cruel" is unconstitutionally vague on its face. That's the provision contained in Section 921.141 (5) of the Florida Statutes.

Well, without going to the merits of

this, this is another point that obviously could have been and probably should have been, if at all, raised as a matter of direct appeal, and is barred, as the Supreme Court of Florida has found, because it was not then raised. And I find that it falls also within the principle of Wainwright vs. Sykes.

The tenth point is that the state withheld psychiatric reports favorable to the accused in violation of the Fifth and Fourteenth Amendment rights. This has to do with a follow-up point in addition to the one that was raised initially having to do with information contained in statements by the defendant's mother, and in particular this one has to do with psychological tests that were administered to Jimmy Lee Smith while he was confined in the Dozier School for Boys, but the results of which were not made known to the

defendant's counsel.

This is a matter that falls within Wainwright vs. Sykes, and I so hold. However, I think some further comment and perhaps an alternative finding is necessary under the circumstances; because in this event I think the defendant has failed to raise sufficient specific allegations that in any way these psychiatric evaluations constitute Brady material. It's not clear to me exactly what those evaluations would show other than the fact that they may have amplified some of the other findings made by the panel of two psychologists who examined Mr. Smith near to the time of trial. In any event they were material that obviously the defendant was aware of because he was a participant in the proceeding and they were available to his counsel and to him just as much as to the prosecution, and they apparently were not

used by the prosecution in any way, and there is some question as to whether they were known other than simply being in existence.

The eleventh and twelfth points have to do with the inquiry into the competency of the defendant. The eleventh one is that the state failed to conduct an inquiry into the petitioner's competency to stand trial in violation of his Fifth and Fourteenth Amendment rights, and the twelfth one is the state trial court unreasonably failed to conduct an inquiry into the petitioner's competency to waive the right to assistance of counsel at the penalty phase of the trial.

In this regard, defendant's counsel have called my attention to a requirement for a competency hearing on the basis of the Pate case. In the event, however, I fail to find that there are any facts

revealed in the record that would constitute an indication or anything that would put the trial court or the state on notice that it should proceed further with regard to the defendant's competency. The matter was raised. A request was made to have the defendant evaluated as far as his competency. This was specifically addressed to competency to stand trial, by the court, and a panel of psychologists determined, after evaluation, that the defendant was competent to stand trial. And despite the somewhat irrational behavior of the defendant in the past, and perhaps during the time he was confined in the jail, the record does not reveal any indication of any overt symptoms of mental incompetency other than the defendant's steadfast insistence upon being punished by death for the things that he had done. And that alone does not appear to me to fall

within the magnitude of a symptom that requires either the trial court or the state to proceed further.

Once the initial determination had been made that the petitioner, Mr. Smith, was competent to stand trial, absent any clear aberration in behavior during the course of the trial which would strikingly bring it home to either the state or the trial judge, which I do not find occurred, I don't see that there was an obligation on the part of either the state or the trial court to proceed further.

In the alternative again I find that both these points were points that could or should have been raised at earlier stages of the proceeding or on direct appeal and are barred by the principle of Wainwright vs. Sykes.

So it appears to me that Wainwright vs. Sykes applies in each one of these six

points that I've just discussed; that is, points seven through twelve. And in the alternative I think I've stated some other grounds that would indicate that no relief appears to be warranted for purposes of this habeas corpus proceeding under any of those seven points in the event that Wainwright vs. Sykes should not apply.

Moving back now to point six, which has to do with the state's withholding mitigating facts from the defense in violation of the defendant's Fifth and Fourteenth Amendment rights, which are basically a Brady violation, Mr. Smith contends and specifically this has to do with statements made by Mr. Smith's mother to the prosecution relating to Mr. Smith's childhood background and some of the troubled history of Mr. Smith. Well, with regard to this point, it not only is a matter that could have been and should have

been raised at the appropriate time, but in the alternative, was raised on appeal and considered by the Supreme Court of Florida, and the Supreme Court of Florida held that it was not a true Brady claim because the withheld eidence was available to both Mr. Smith and his trial counsel insofar as it involves the appellant's own life story, to quote from the Supreme Court opinion.

I find that in the event Wainwright vs. Sykes does not apply, this finding by the court, which is based upon the matters contained in the record, is a factual determination. This is a factual issue to a large extent, if not totally, and is entitled, for purposes of this proceeding, to deference by this court as a factual finding.

So, under either the alternative basis of a factual finding which this court will defer to because there's nothing in the

evidence that I have seen, nor is there anything which has been pointed out to me, that would render that decision not substantially supported by the evidence, or in the alternative, this is a matter which is within the category of matters barred by the principle of Wainwright vs. Sykes.

Point number five raises a question of the violation of the defendant's Fifth and Fourteenth Amendment rights when the trial court failed to properly instruct the jury that no confession should be considered unless the jury is convinced beyond a reasonable doubt of its voluntary nature.

This is, of course, a question of whether there is an obligation when no objection is made to the admission of a confession, whether there is an obligation on the part of the trial judge, or whether there is a constitutional violation involved, and this, as I noted earlier,

seems to be squarely within the principle of Wainwright vs. Sykes because, as I recall, that was a specific instance upon which that case went to the U.S. Supreme Court, so it seems to be on all fours, and would be barred under that precise principle found by the Supreme Court in that case.

Turning now to point four, the introduction into evidence of the defendant's postconviction confessions after the defendant had invoked his right to counsel, all in violation of the defendant's Fifth, Sixth and Fourteenth Amendment rights, again this matter was not raised during the trial, nor was it raised on direct appeal, and the state Supreme Court found that it was a matter of procedural default, and again it falls within the principle of Wainwright vs. Sykes.

The third point is the question of the Witherspoon issue, Witherspoon being the inquiry into a juror's feelings about the death penalty when a capital case is being tried.

Specifically there were three jurors who were excused because of their response to the Witherspoon inquiry; and Mr. Smith maintains that there were two errors involved: one being that the prosecution's questions asked about this matter were constitutionally overbroad and inexact, citing to the case of Alderman vs. Austin, a Fifth Circuit decision of 1981; and, second, that the inquiry into these attitudes about the death penalty was not sufficiently thorough as to ascertain the true nature of their beliefs.

This matter was considered by the Supreme Court of Florida, and in its opinion it concluded that the evidence in

the record, the trial transcript, reveals that the responses of the three individuals involved in this inquiry were specific enough to meet any Witherspoon test.

Now, Mr. Thomas and Ms. Bleakley have indicated to me, particularly Mr. Thomas, who argued this point, that this is a question involving mixed law and fact and is not one that is automatically one to which we should defer as a factual finding. And I agree that it is one of mixed law and fact. But the law, I don't think, is in question. The law is simply what is required by Witherspoon, and the fact is, what was the inquiry made and what was the response. And I agree with the Supreme Court of Florida that the inquiries and the responses are sufficient to ascertain that these individuals would not vote for a sentence of death if they were selected as jurors under any

circumstances. The trial court so found, impliedly found that, and the Florida Supreme Court also found as a matter of fact that was the case.

I find nothing in the record that would indicate that that finding is not amply supported. So on that basis, since the Florida courts have agreed to address it, and assuming that Witherspoon, I mean the Sykes principle does not apply, I would have to defer to that factual finding and find that it's not a matter that requires further inquiry by this court for purposes of this habeas corpus proceeding. Particularly the Supreme Court of Florida stated that in light of the testimony by each of the jurors in question, that under no circumstances would he vote to put a person to death, "We are of the opinion that the Witherspoon holding is complied with and that they were properly excused

for cause." And I agree with that.

The next point is the one that I have a great deal more difficulty with, not so much on the face of it, which is the question of whether an appropriate Faretta inquiry was made prior to the time Mr. Smith was permitted to make the closing argument to the jury in lieu of having his attorney do that. Because, after examining the record very thoroughly, it seems to me that both the trial judge and Mr. Jones, the State Attorney, asked all the questions that are necessary to bring out not only Mr. Smith's intelligent response but also an informed response as to the consequences of his actions, and his adamant determination to proceed with his intent to ask that jury to recommend the death sentence for him. And I do sense that the trial judge was somewhat frustrated with this because it's a very novel and unusual

situation for a person to want to do that.

But the wider ramification of this entire problem has to do with not only the attorney himself but, to a lesser extent, the trial judge, and even the State Attorney, having to deal with a defendant who, early on in this proceeding, made up his mind that he had admitted his guilt not only to these offenses but to other offenses occurring years past, and he was inclined, if he was given a life sentence and subsequently released, to do it all over again, and the only way that he could make amends for what he had done and to insure that it would not happen again was to have his death wish fulfilled; and he insisted on that, and it seems to have spilled over into his relationships with his attorney, with the actions taken by his attorney, and it's quite clear from the portions of the transcript where this

defendant indicates this to the judge and to the others during the thirteen pages or so of transcript material in which this matter was raised with him, that this was not something that he had decided to do lightly or on the spur of the moment but was something that he had given almost constant thought to for the entire period of time that he was awaiting trial, a period of approximately four months, and that despite the problems brought to his attention by Mr. Jones, the State Attorney, and by the trial judge, he was insisting that he was going to follow through and ask the jury to recommend the death sentence in his case, which he did.

But the spillover of this is a troublesome aspect. It's one that reaches far beyond the law. Ms. Bleakley indicated the law simply, at this point in time, has not addressed the question of how do you deal

with a defendant who is bent on his own self-destruction but is doing so, from all appearances, with full knowledge of the consequences and with full awareness of what he was doing and without any overt symptoms of being incompetent to make that decision. And I'm satisfied that we can not, six years later, and I don't think the trial court could in the heat of the trial, nor could his attorney and the State Attorney during the limited time leading up to his trial, take any steps consistent with the individual liberties that are really the fundamental principle guaranteed by our Constitution, denying him his right to seek this result.

In any event it seems to me that this matter was raised before the Supreme Court of Florida and the Supreme Court of Florida addressed it and pointed out all of the points raised with Mr. Smith during the

dialogue that went on between Mr. Smith and the trial judge, and Mr. Smith and Mr. Jones, and the additional comments and explanation made by his attorney. And all of these were found by the Supreme Court of Florida to meet the criteria set out in Faretta, and I have examined the record and I find that those facts and those factual determinations are not in conflict with what I have found in the record, and they are supported by the record.

And as to the legal aspect of this question, I do not find that Faretta requires a further inquiry under circumstances such as exist in this case. There is no indication to me from what's in the record that the trial judge should have been alerted to proceed further than to accept at face value the determination by the two examining psychologists that Mr. Smith was sane, competent to make these

determinations for himself; and certainly once you get past that point and once you make an inquiry as to the defendant's reasonable intelligence, what he was doing was not waiving counsel entirely but simply relieving his counsel from an untenable position in which his counsel said that he could not ethically ask the jury to recommend a death sentence, and his client, Mr. Smith, had specifically asked him not to plead for mercy, and that under those circumstances he had to ask the court to intervene and to ask Mr. Smith to have the opportunity to do so himself, and Mr. Smith asked for that opportunity, and, after what I consider to be an adequate examination, was granted permission to do so. He was, I think, warned of the danger and he emphatically indicated to everyone concerned that he recognized fully the consequences of what he was doing.

So on the basis of that I find that this point raised fails to indicate any error that would warrant further consideration by this court for purposes of this proceeding.

Now we get to the one that to me presents the most serious question raised before the court, and it's not by coincidence that it's numbered numer one by the defendant's attorneys and was considered, I think, to be the most important by the State of Florida. And that is whether there was a denial of effective assistance of counsel in this case.

Mr. Smith's attorneys have pointed out a number of things that his counsel failed to do. They maintain that he did essentially no pretrial preparation; he failed to properly inquire into the defendant's mental status as it relates to criminal responsibility; he did not file any motions

for discovery; he deposed no state witnesses; he failed to contact and investigate witnesses for the penalty stage; he failed to investigate the mental state as relates to competency to stand trial, with regard to the Pate vs. Robinson test; he filed no motions in aid of appellant's defense other than motion for evaluation of appellant's sanity and competency to stand trial; he made no motions to suppress the obviously very damaging confessions made by the defendant; he made no attempts to keep law enforcement personnel from interrogating his client, Mr. Smith, while he was in confinement; he didn't properly voir dire the jury; he failed to object to the prosecution's examination of the Witherspoon question before the jury; he himself failed to make the necessary Witherspoon inquiries; that he only cross-examined three of the

witnesses and then only in a perfunctory manner; he directed the court reporter not to transcribe his closing argument; and for purposes of the penalty phase of the trial he stipulated to the use of the video recording of approximately one and a half hours in which this defendant not only confessed to the murder of these two individuals here but he confessed to another murder, various rapes, over a hundred automobile thefts and various and sundry other matters which in many respects were detrimental to the defendant's position; and he failed to investigate or contact witnesses or explore any potential mitigating circumstances in this regard.

I guess more troubling, too, is the failure of the trial court in the hearing on the postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure to conduct an evidentiary hearing

after having been requested to do so by the defendant's attorneys and also by the attorneys representing the State of Florida. And I have wrestled with this problem for most of the last thirty-six hours. And the problems that I am facing, I am sure, are problems that other people, including judges and attorneys, have in trying to ascertain whether the adequacy of representation of counsel is a matter that warrants further inquiry or is of such a constitutional magnitude as to warrant granting a writ of habeas corpus.

I go back to the basic Supreme Court decision that sets out when evidentiary hearings are necessitated, and that is the case of Townsend vs. Sain, in which the Supreme Court analyzed at length, I think, circumstances under which evidentiary hearings should be held. But after going through all of those, they conclude by

making the statement that, "If the state court has decided the merits of the claim but has made no express findings it may still be possible for the district court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible and the federal district court will be compelled to hold a hearing." And my inquiry at this point in time is whether I am compelled to hold a hearing under the circumstances such as we have here.

I think for purposes of my review of this matter the Eleventh Circuit's opinion in Thomas vs. Zant of 1983 is really the guiding case for all the district courts in this circuit, and it appears to mandate an evidentiary hearing if there are items of material evidence which have not been fully

or adequately developed at the state court hearing as required by Section 2254(b)(3); that is, the federal habeas corpus statute.

On the other hand, I'm compelled to look at some of the more recent Supreme Court decisions and particularly the Strickland vs. Washington standard in which the court quite clearly sets out that inquiries into effective assistance of counsel require the court to make a two-prong analysis and in the event that either of those prongs are deficient then no further inquiry is necessary.

In that regard Justice O'Connor stated that, "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that

counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. And, second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it can not be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Now, specifically in this case this issue was taken to the Supreme Court of Florida, and the Supreme Court of Florida determined that no evidentiary hearing was necessitated under the particular circumstances present in this case, and they denied relief upon the four-step determination set out in Knight vs. State, which is

a Florida Supreme Court decision of 1981. And those principles essentially are these: that the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading. I find that that has been done here.

Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. In making the second determination the performance of counsel must be judged in light of the totality of the circumstances.

And, third, the defendant has the burden to show that this deficiency, when considered under the circumstances of his case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the

deficient conduct affected the outcome of the court proceedings.

Now, that is the standard, of course, to which I earlier inquired of counsel and the one which seems to me to have anticipated the U.S. Supreme Court's decision in Strickland vs. Washington, and in particular the last part of that determination, which indicates that no evidentiary hearing is called for if the question of prejudice can be determined from the record.

And finally the fourth standard set out by Knight vs. State and relied upon by the Florida Supreme Court in this appeal was that in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice the state still has the opportunity to rebut those assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

The Florida Supreme Court found that Mr. Smith had failed to demonstrate that but for any of the claimed omissions of trial counsel the results of his case would have been different. Nothing has been shown, again quoting, "concerning what evidence would have been discovered had counsel not failed to do the specific acts which appellant claims constitute ineffective assistance of counsel. Appellant has failed the requirement under Knight of showing any of these deficienies were substantial enough to demonstrate a prejudice to him."

In looking at this matter I was initially of the opinion that an evidentiary hearing was mandated simply because in order to ascertain what counsel had done required testimony from counsel himself, and I was of the opinion that it was error for the trial judge to have denied an

evidentiary hearing because otherwise that information could not be amplified and made a matter of record.

The state has filed an affidavit. There is some question as to how that affidavit should be considered by the court. For purposes of summary judgment proceedings obviously Mr. Smith's attorneys have not had an opportunity to at least respond to that affidavit in some way, but I find that the affidavit is properly filed with the court. But I'm not going to consider it for purposes of ruling either on a motion to dismiss or motion for summary judgment. Instead I find that by looking at the record as a whole, and particularly the exchange and the statements made by Mr. Smith that are in the record, and from the circumstances that are made quite clear based upon the record as a whole, that there does not appear to

have been any action that could have been taken by Mr. Smith's attorney consistent with his service as an attorney that would have resulted in any different result if Mr. Smith was afforded his right to address the jury and to specifically ask the jury for a recommendation of the imposition of the death sentence.

Strickland vs. Washington says that the test ought to be whether the trial was a fair trial and whether the result would have been different had counsel taken different steps or acted differently or in any way done any of the things which Mr. Smith now maintains should have been done.

And, taken as a whole, I can not find that there is any probability that this result would have been any different had Mr. Smith's attorney taken all of the steps which are outlined by his attorneys for purposes of this proceeding. I think it

would have been preferable to have held an evidentiary hearing at the trial court level. I certainly would encourage state trial judges to do so, because it would alleviate a lot of the concern that comes before federal judges when the matter gets to this almost crisis stage. But I do not find that under the particular circumstances of this case that an evidentiary hearing is warranted. The U.S. Supreme Court has indicated that a hearing is not mandated or required if you can find with regard to the prejudice element that you don't have to go into the performance element.

If we had to go into the performance element of counsel quite clearly we would have to have an evidentiry hearing. But under the circumstances of this case and the unique circumstances, I might add, in which not only was counsel attempting to

prepare a defense but he was obviously, throughout the preparation period and in the trial itself, wrestling with his client and eventually unable to dissuade his client from making a plea to the jury in person, asking for a death sentence to be imposed, and as long as that was going to be the end result I can't, and I asked counsel and I don't think counsel have been able to come up with any concrete responses, I can't think of anything that counsel could have done that would have changed this outcome. And for that reason I am not going to require an evidentiary hearing and I find that on the basis of the matters presented to me the state's motion to dismiss for failure to state a cause of action under Rule 12(b)(6) is appropriate and should be granted in this cause.

And under those circumstances the stay is not warranted so the motion for stay

will be denied. Because of the urgency of the matter I'm going to ask the court reporter to transcribe this opinion, and it's the order of this court that the motion for stay is denied and the motion of the state for dismissal of the petition for writ of habeas corpus is granted. I'm not sure if there are any other procedural matters that we need to address at this time. . . .

Based upon my analysis of the case I will deny a certificate of probable cause. . . .

I'm going to deny the stay for the reasons already stated. . . .

We stand adjourned.

(The hearing was adjourned at 1:24 P.M.)

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I certify that the forgoing is a correct transcript from the record of proceedings in the above-entitled matter.

John M. Suda — 7/11/84

Court Reporter — Date

# APPENDIX III

Copy of the Constitutional
Provisions and Regulations Involved

Amendments V, VI, and XIV (Section 1), Constitution of the United States:

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rules 17(1) (a) and (c), Rules of the Supreme Court of the United States:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a

federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

**APPENDIX IV**

Copy of the Unrebutted
July 9, 1984 Affidavit of Assistant
Public Defender Herman D. Laramore

STATE OF FLORIDA
COUNTY OF JACKSON

A F F I D A V I T

Before me, the undersigned authority, duly authorized to administer oaths in the aforesaid county and state, personally appeared before me this day HERMAN D. LARAMORE, Assistant Public Defender of the Fourteenth Judicial Circuit, and after being duly sworn, deposes and says:

The following is a true statement of my representation of JIMMY LEE SMITH on two counts of First Degree Murder, Case Numbers 5-78-200 and 5-78-201, in Jackson County, Florida.

I was an Assistant Public Defender of the Fourteenth Judicial Circuit on May 2, 1978, and had been practicing law for seven years and served as part-time assistant public defender my entire law career. I was at the Jackson County Jail in the

morning hours of May 2, 1978, when INVESTIGATOR GARY SULLIVAN Of the Marianna Police Department advised me that they had just arrested a burglary and forgery suspect and he had asked for a lawyer. I was introduced to JIMMY LEE SMITH, and I privately talked with him concerning the alleged forgery charges. The facts surrounding his arrest were that on May 1, 1978, JIMMY LEE SMITH had gone to a drive-in bank window and attempted to cash a check on a local construction company who had reported a burglary where a check-writing machine and blank checks had been stolen. The bank teller became suspicious and called police wherein a high-speed pursuit was taken of JIMMY LEE SMITH and he wrecked the car and fled on foot. In the wrecked auto was found the stolen checks and JIMMY LEE SMITH's wallet. Police had substantiated that the car was registered

in BONNIE WARD's name. Inquiries were made by police as to where BONNIE WARD was and JIMMY LEE SMITH reported that he had dropped her off at the Dairy Queen for ice cream prior to his going to the bank and had not seen here since the police had taken pursuit. I advised JIMMY of his rights, which he stated he understood and instructed him not to talk to the police. He stated that they had him on the forgery charges and he wanted me to work a plea agreement as soon as possible. I spent approximately twenty minutes with JIMMY in my first contact with him.

The following morning, May 3, 1978, JIMMY LEE SMITH was first appearanced and the Public Defender's Office was appointed to represent him and bond was set at $10,500.00. A copy of First Appearance of May 3, 1978, is attached and by reference made a part hereof.

On May 3, 1978, I received a call from LT. RON STEVERSON of the Jackson County Sheriff's Department advising that the bodies of BONNIE WARD and DONNA STRICKLAND had been found and the evidence pointed toward JIMMY LEE SMITH. He gave me a brief summary of why they believed JIMMY had committed the murders. I immediately went to the County Jail and talked with JIMMY. I advised him of what the Sheriff's Department had found, the evidence they had, and that they believed he had committed the murders. Based upon the already collected evidence, it appeared that he had committed the murders and under no circumstances should he make any statements to anyone. I further advised him to call me at any time he needed me and I would come right over to the jail since my office was only one block away. JIMMY understood the seriousness of the potential

murder charges, because we discussed the consequences fully. I spent approximately one hour with him. Later, LT. RON STEVERSON advised me that he had attempted to talk to JIMMY and that JIMMY told him he had not harmed either victim.

The next day, May 4, 1978, LT. STEVERSON approached JIMMY again and had him sign a statement of rights form, and he advised JIMMY of all of the evidence they had against him. JIMMY refused to talk to him in the presence of another investigator who then exited the room. JIMMY then gave LT. STEVERSON an oral confession statement which resulted in a complaint being filed against JIMMY for two counts of First Degree Murder. LT. STEVERSON called me and advised that JIMMY had waived his rights to an attorney and had confessed to the two murders. I immediately went to the jail and talked to JIMMY, who advised me that he

had confessed to the murders and that he was tired of killing and that something had to be done with him. I advised him of the consequences of what he was doing, and he stated he understood perfectly well what he was doing.

The following day, May 5, 1978, JIMMY was first appearanced before the County Judge on murder charges and held without bond.

Thereafter, over a period of days, JIMMY made several statements concerning the details of the murders including one video taped confession. Before each statement, he signed a Statement of Rights form waiving an attorney and acknowledging that he understood what he was doing and was not being coerced or threatened.

JIMMY like LT. STEVERSON very much and would insist that STEVERSON spend time at the jail visiting him. If a few days

passed without STEVERSON coming to see him, he would destroy his cell contents and create so much problem at the jail that STEVERSON would have to quit whatever he was investigating and go visit JIMMY. I saw JIMMY on a very frequent basis, and I continually advised him that LT. STEVERSON was a nice man, but his job was to convict JIMMY of the murders.

After the first confessions on May 4, 1978, JIMMY insisted that he was going to plead guilty to the murder charges. I insisted that he go to trial and require the State to prove him guilty beyond a reasonable doubt. JIMMY's position was that he was guilty and the State had more than enough evidence to convict him, therefore, there was no need for a trial. I persuaded him to submit to psychological examination through some deception, such as telling him maybe we could find out why he

killed people. When the psychological results found JIMMY competent to stand trial and legally sane at the time of the incident, JIMMY insisted on pleading guilty immediately. Through the assistance of VIRGIL Q. MAYO, Public Defender of the Fourteenth Judicial Circuit, we were able to convince him to go to trial and require the State to prove him guilty beyond a reasonable doubt to a jury. His agreement to go to trial was with the understanding that he did not have to testify in his own behalf. We advised him that he could not be forced to testify. JIMMY also insisted that I make no closing argument at the close of the guilt phase of the trial and that he be allowed to make a statement to the jury in the sentencing phase of the trial. I advised him that the Court would have to decide those matters after inquiring if JIMMY understood the

consequences of what he was doing. Based upon the above conditions, JIMMY agreed to go to trial. I then advised him that the psychologist had recommended an electroencephal gram (EEG) be run on him. He refused any further tests and insisted on immediate trial and later signed an acknowledgment stating that I had discussed the psychological test results with him and the recommendation of the EEG and that he did not desire any further tests.

No pretrial motions to suppress the confession of JIMMY LEE SMITH WAS FILED since in my opinion they would have been frivolous. First, I had personally instructed him twice not to make statements, yet he signed several waivers and made several statements confessing to the present case as well as other crimes. Second, JIMMY did not complain of any threats, coercion or promises in

consideration for his confession. In fact, he had only the highest respect and regard for LT. STEVERSON. Needless to say, a motion to suppress without the cooperation of the defendant would have been frivolous.

As previously stated, JIMMY insisted on seeing LT. STEVERSON on a regular basis, and if he didn't see him, he would destroy his cell, breaking everything inside. On one occasion, he got mad because STEVERSON did not come immediately when he sent for him, and he ripped his bed sheet into strips and made a lariat. He lassoed the video camera monitor of the cell block, which was located outside his cell in the catwalk and pulled it off the wall, drug it through the cell bars and smashed it into pieces. This was typical of his behavior when STEVERSON did not visit regularly. Any attempt to keep STEVERSON away from him would have compounded the problem and

destroyed my relationship with JIMMY.

The State Attorney's office and the Jackson County Sheriff's Department made available to me their entire files, including work product. There were numerous items of incriminating evidence available against JIMMY that were never used in the trial. The State used only enough to convict him. I know of no evidence or information that was not made available to me.

I was not contacted by any of JIMMY's family or friends concerning his defense. JIMMY insisted that I not contact his mother and other family members stating that he did not want them involved and they could not be of an benefit to him.

I was born and reared in Jackson County and I personally knew most of the prospective jurors as well as the jury selected. I personally conducted my

investigation of prospective jurors and the facts of the case. I did not use the services of an investigator, because I prefer to do my own. I feel that it is the duty of the attorney to work his case rather than use investigators who do not understand what I want to know.

The trial consisted of a routine case where no valid defense was available. At the close of the State's case, JIMMY refused to take the stand in his defense.

JIMMY objected to me making a closing statement in his behalf. A conference was held with the Court out of the presence of the jury and off the record, and JIMMY was persuaded to allow me to make a statement before the jury concerning the burden of the State to prove JIMMY guilty beyond a reasonable doubt. At the penalty phase of the trial, I agreed to the showing of the one and one-half hour video taped statement

of JIMMY which told his life story which included his childhood, family problems, mistreatment, illnesses, criminal history and commission of the present crimes. This was a pitiful story that brought tears to spectators. I felt this was my only hope to get sympathy from the jury and they would grant JIMMY his life, knowing that JIMMY was insisting on asking for the death penalty.

I brought to the Court's attention on the record, out of the presence of the jury, JIMMY's desire to ask for the death penalty, and the judge and prosecutor questioned JIMMY extensively about his deisre to ask for the death penalty, and yet he insisted on making his own argument. Therefore, he was allowed to do so and he requested that the jury recommend the death penalty. In JIMMY's closing statement he acknowledge, "MR. LARAMORE has

tried everything that he can do to talk to me out of it, but I wouldn't let him do it." The jury returned a death recommendation and the Court imposed the death penalty.

Thereafter, I received numerous letters from JIMMY thanking me for trying to help him. I corresponded with JIMMY for several months after his sentencing, and finally discontinued after the issue of ineffective assistance of counsel arose.

FURTHER AFFIANT SAYETH NOT.

Herman D. Laramore

Sworn to and subscribed before
me this 9th day of July, 1984.

Jacqueline B. MacLaren
NOTARY PUBLIC State of Florida
My commission expires July 1987
Bonded thru General Insurance Fund

**APPENDIX V**

Copy of Trial Court Documents
Involving Respondent's First
Appearances, Arrests, Waviers of
the Right to Counsel, Indictment,
and Arraignment

IN THE COUNTY COURT
IN AND FOR JACKSON COUNTY

STATE OF FLORIDA
vs.
JIMMY LEE SMITH

FIRST APPEARANCE
RCrP 3.130, 3.131

You, JIMMY LEE SMITH, having been arrested on 5/2/78 at 8:26 a.m. are informed a complaint has been made charging you with Burglary, Fleeing or Att. to Elude Police Officer, Wilful & Wanton Reckless Driving, Grand Larceny & Fugitive, and a copy of the complaint is provided herewith. You are informed you have a right to remain silent, and if you do not remain silent anything you say may be used as evidence against you in court. You are informed you have a right to be represented by a lawyer, and if you desire one and cannot afford to hire one, a lawyer will be appointed for you free. You have a right to communicate with your lawyer, family or friends and if you

desire to do so reasonable means will be provided for you to do so. If an information or indictment is not filed against you within 21 days of your arrest you shall have the right to an adversary preliminary hearing on any felony charge then pending against you. You may waive the right to counsel for the purpose of this first appearance only without jeopardizing this right at subsequent proceedings.

I have read or have explained to me my rights outlined above and hereby affirm I (am) (<u>am not</u>) able to hire a lawyer and that I (<u>do</u>) (do not) want a lawyer appointed for me at this time.

Jimmy Lee Smith
(Defendant)

Charles M. Wynn
(Counsel for defendant present at first appearance)

The foregoing was voluntarily and knowledgeably signed in my presence after full explanation of the defendant's rights.

Woodrow W. Hatcher
(Judge)

Having examined the necessary proof at a non-adversary probable cause hearing, I find probable cause (does) (does not) exist for detaining the defendant pending further proceedings.

Woodrow W. Hatcher
(Judge)

Bail is set at $ 10,500

5-3-78 9:53 a.m.
Date Time

I acknowledge receipt of a copy of the above and I fully understand it.

Jimmy Lee Smith
(Defendant)

COMPLAINT

Offense Murder Date Committed May 1, 1978 Fla. Statute 782.04(1)(a) Offense Report No. 78-050305

Has Def. been arrested? yes Date 5-4-78

Authority: PD____ SO X Other_____

| Defendant(s) | Sex | Race | DOB | Ht. | Wt. |
|---|---|---|---|---|---|
| 1. Jimmy Lee Smith | M | W | 1/19/53 | 5'10" | 160 |

Address At LARGE. . .

---

**BRIEF STATEMENT OF FACTS** (State facts which led to belief that a crime was committed, and that defendant(s) did it):

On May 1, 1978, the Jackson County Sheriff's Department, Marianna Police Department, and the Florida Highway Patrol gave pursuit to a green Chevrolet vehicle. The vehicle was wrecked on SR 69 south of Dellwood , Fla. and the suspect,

Jimmy Lee Smith, fled into a wooded area. On May 2, 1978, at approximately 8:00 a.m, Investigator Devon Land, Jackson County Sheriff's Department, arrested Mr. Jimmy Smith as he exited the woods on SR 69. The green Chevrolet station wagon was listed as belonging to a Bonnie Ward of Cottondale, Fla. Upon going to Cottondale to check with the owner of the car, it was discovered that the mother was missing. Four children were found at the Bonnie Ward Home, Mellisa, 2 yrs old, David, who was 3 yrs old, Patricia, 6 yrs. old, Sherry, 14 yrs. old. Also missing from the home was Donna who was 12 yrs. old. Sherry Strickland stated that upon Patricia and her arriving home from Cottondale High School (2:30 p.m.) she found the younger children (Mellisa and David) alone at home. Upon this investigator interviewing the 3 year old child, the following was

revealed: David stated that he and his mother, Bonnie, along with Mellisa and Donna went to visit the other sister, Danna, who was in the Graceville-Campbellton Hospital. David stated that later on Jimmy Smith took all three of them down a "baby dirt road" on SR 169. David stated to this deputy that Jimmy Smith struck his mother and placed her in the grass.

Upon receiving this information, a search was instituted by the Jackson County Sheriff's Department. On May 3, in the A.M., Lt. Claude Widner located the body of Donna Strickland in a wooded area off SR 169. A short time latter, Capt. David Turnage located the second body of Mrs. Bonnie Ward in a grassy area a short distance from the first body.

The two victims were identified positively by the family as being that of

Mrs. Bonnie Ward and her daughter, Donna Strickland.

The victims were transported to Bay Medical Center for autopsies by Dr. Ralph Monaco. Mrs. Bonnie Ward expired due to the combination of the severance of the carotid artery and multiple stab wounds that punctured the upper left pleural cavity resulting in massive hemmoraging.

The daughter, Donna, apparently expired due to multiple stab wounds of the upper left pleural cavity and a large trauma opening in the center of the thoracic area resulting in massive hemmoraging.

These crimes were sex related.

On May 4, after advising Mr. Jimmy Lee Smith of his Miranda decision rights the following was revealed to Investigator Ron Steverson and Investigator Devon Land that he did in fact stab both Bonnie Ward and Donna Strickland with a buck knife. Mr.

Smith stated that he then covered the bodies in a grassy area of SR 169. . . .

Person Assaulted or Murdered:

Donna Strickland (and) Bonnie Ward.

After being duly sworn, the undersigned affiant states that the above facts are true. Sworn to me this 5th day of May, 1978

David R. Turnage
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 6, 1981

Lt Ron Steverson Affiant
Address JCSD

IN THE COUNTY COURT
IN AND FOR JACKSON COUNTY

STATE OF FLORIDA

vs.

JIMMY LEE SMITH

FIRST APPEARANCE
RcrP 3.130, 3.131

You, Jimmy Lee Smith, having been arrested on 5/4/78 at 5:00 p.m. are informed a complaint has been made charging you with 2 Counts-MURDER and a copy of the complaint is provided herewith. You are informed you have a right to remain silent, and if you do not remain silent anything you say may be used as evidence against you in court. You are informed you have a right to be represented by a lawyer, and if you desire one and cannot afford to hire one, a lawyer will be appointed for you free. You have a right to communicate with your lawyer, family or friends and if you desire to do so reasonable means will be

provided for you to do so. If an information or indictment is not filed against you within 21 days of your arrest you shall have the right to an adversary preliminary hearing on any felony charge then pending against you. You may waive the right to counsel for the purpose of this first appearance only without jeopardizing this right at subsequent proceedings.

I have read or had explained to me my rights outlined above and hereby affirm I (am) (<u>am not</u>) able to hire a lawyer and that I (<u>do</u>) (do not) want a lawyer appointed to me at this time.

Jimmy Lee Smith
(Defendant)

Charles M. Wynn
(Counsel for defendant present at first appearance)

The foregoing was voluntarily and knowledgeably signed in my presence after full explanation of the defendant's rights.

Woodrow W. Hatcher
(Judge)

Having examined the necessary proof at a non-adversary probable cause hearing, I find probable cause (does) (does not) exist for detaining the defendant pending further proceedings.

Woodrow W. Hatcher
(Judge)

Bail is set at $ No Bail

5-5-78 9:08 a.m.
Date Time

I acknowledge receipt of a copy of the above and I fully understand it.

Jimmy Lee Smith
(Defendant)

A-134

JACKSON COUNTY SHERIFF'S DEPARTMENT

PLACE Jackson Jail
DATE 5-5-78
TIME 12:10 p.m.

STATEMENT OF RIGHTS

Before you answer any questions or make any statement, you must fully understand your rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to consult with a lawyer before you answer any questions or make any statement and to have him present during questioning.

4. If you cannot afford a lawyer, one will be appointed for you before questioning or at any time during questioning, if you so desire.

5. If you answer questions or make a statement without consulting a lawyer or without having a lawyer present during questioning, you will still have the absolute right to stop answering questions or making any statement until you consult with a lawyer or have a lawyer present during further questioning.

Ron Steverson
Name of Officer

## ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

The above statement of rights has been read and explained to me and I fully understand what my rights are. I am ready and willing to answer questions or to make a statement without first consulting with a lawyer or without having a lawyer present during questioning. In waiving my rights to remain silent, I wish to state that no promises or threats have been made to me and no persuasion or coercion has been used against me.

Jimmy Lee Smith
Signature

JACKSON COUNTY SHERIFF'S DEPARTMENT

PLACE Jackson Jail
DATE May 16, 1978
TIME 7:00 p.m.

STATEMENT OF RIGHTS

Before you answer any questions or make any statement, you must fully understand your rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to consult with a lawyer before you answer any questions or make any statement and to have him present during questioning.

4. If you cannot afford a lawyer, one will be appointed for you before questioning or at any time during questioning, if you so desire.

5. If you answer questions or make a statement without consulting a lawyer or without having a lawyer present during questioning, you will still have the absolute right to stop answering questions or making any statement until you consult with a lawyer or have a lawyer present during further questioning.

Ron Steverson
Name of Officer

ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

The above statement of rights has been read and explained to me and I fully understand what my rights are. I am ready and willing to answer questions or to make a statement without first consulting with a lawyer or without having a lawyer present during questioning. In waiving my rights to remain silent, I wish to state that no promises or threats have been made to me and no persuasion or coercion has been used against me.

Jimmy Lee Smith
Signature

In the Circuit Court, For the Fourteenth Judicial Circuit of Florida. Jackson County, Spring Term, in the year of Our Lord One Thousand Nine Hundred and Seventy-Eight.

THE STATE OF FLORIDA )
)
-vs- )
)
JIMMY LEE SMITH )

INDICTMENT -- TWO COUNTS

COUNT I: MURDER IN THE FIRST DEGREE (F.S. 782.04)

COUNT II: MURDER IN THE FIRST DEGREE (F.S. 782.04)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

COUNT I

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true presentment make in and for the body of the County Jackson upon their oath do present that Jimmy Lee Smith of the County of Jackson and State of Florida, on or about the 1st day of May, 1978, in Jackson County, Florida did unlawfully from a

premeditated design to effect the death of Bonnie Myrle Ward, did kill the said Bonnie Myrle Ward by strangling her and/or by stabbing her with a knife, contrary to Florida Statutes Chapter 782.04, in such cases made and provided and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true presentment make in and for the body of the County of Jackson upon their oath do present that Jimmy Lee Smith of the County of Jackson and State of Florida, on or about the 1st day of May, 1978, in Jackson County, Florida did unlawfully from a premeditated design to effect the death of Donna Lynn Strickland, did kill the said Donna Lynn Strickland by strangling and/or by stabbing her with a knife, contrary to

Florida Statutes Chapter 782.04, in such cases made and provided and against the peace and dignity of the State of Florida.

A TRUE BILL

Joe L. Hutton
FOREMAN OF THE GRAND JURY

I, LEO C. JONES, STATE ATTORNEY, FOR THE FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, AS AUTHORIZED AND REQUIRED BY LAW, DID ADVISE THE GRAND JURY RETURNING THIS INDICTMENT, DATED THIS 6TH DAY OF June, A.D., 1978.

Leo C. Jones
LEO C. JONES
STATE ATTORNEY

PRESENTED IN OPEN COURT BY THE GRAND JURY AND FILED THIS THE 6th DAY OF June A.D. 1978.

Raymond R. Bruner
CLERK OF THE CIRCUIT COURT

The Defendant being duly arraigned upon this INDICTMENT, pleaded not guilty by written plea.

WITNESS my hand and official seal this August 28, 1978.

RAYMOND R. BRUNER
Clerk of the Circuit Court

BY Al Carraway
Deputy Clerk

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR JACKSON COUNTY,
FLORIDA, Case No. 5-78-200
& 5-78-201

STATE OF FLORIDA,

-vs-

JIMMY LEE SMITH,

Defendant.

. . . . . .

COUNT I: MURDER IN THE FIRST DEGREE

COUNT II: MURDER IN THE FIRST DEGREE

P L E A

The undersigned, attorney for the defendant, Jimmy Lee Smith, enters a plea of not guilty to the charge of, Count I: Murder in the First Degree and Count II: Murder in the First Degree, against the defendant in this case.

Dated this 28th day of August 1978.

Herman D. Laramore
ATTORNEY FOR DEFENDANT
HERMAN D. LARAMORE
Assistant Public Defender

P. O. Box 793
Marianna, Florida, 32446
Phone 904/526-3520

I hereby certify that a copy hereof has been furnished to Honorable James P. Appleman, Assistant State Attorney, Post Office Box 1561, Marianna, Florida, 32446, by U.S. Mail, this 28th day of August, 1978.

Herman D. Laramore
HERMAN D. LARAMORE

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1793

IN THE

# Supreme Court of the United States

October Term, 1985

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections

*Petitioner,*

v.

JIMMY LEE SMITH,

*Respondent.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Sarah M. Bleakley
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Tallahassee, FL 32301
(904) 878-6471

HOLLAND & KNIGHT

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44pp

## QUESTION PRESENTED FOR REVIEW

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY RULED THAT AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE SMITH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. An Evidentiary Hearing Is Needed To Test Smith's Claims That He Was Unconstitutionally Denied Effective Assistance of Counsel.

B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Claim.

C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court of Appeals.

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B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Claim.

C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court of Appeals.

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## STATEMENT OF CASE AND FACTS

Smith accepts the Court of Appeals' statement of the case and facts with one point of clarification. The State's statement of the case gives the impression that the Eleventh Circuit reversed on the basis of the underlying substantive issues. In fact, the ruling below is interlocutory in nature because it concerned only the necessity of further factual development under Townsend v. Sain, 372 U.S. 293 (1963).[1]

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[1] In this Response, the record below is referred to as ("RV [Volume], [Page]"). For example, RV 3, 23 refers to page 23 of volume 3 of the record. "A." refers to petitioner's appendix. "Pet." refers to the State's petition for writ of certiorari in this case.

## SUMMARY OF THE ARGUMENT

Smith petitioned for habeas corpus relief alleging that his trial counsel was ineffective under the standards of Strickland v. Washington and United States v. Cronic. The Eleventh Circuit ruled that it needed more facts to properly analyze Smith's ineffective assistance of counsel claims and remanded the case to the district court for an evidentiary hearing. In essence, the Eleventh Circuit ruled that it would be premature to address Smith's claims on an inadequate factual record. Despite the interlocutory nature of the Eleventh Circuit's decision, the State asks this Court to rule on the underlying issue of ineffective assistance of counsel.

The State's attempt to seek review at this "interlocutory" stage of the proceeding should be denied. Substantial facts

remain to be developed concerning the confessions that Smith's counsel failed to move to suppress below. These questions include Smith's attempt to invoke his right to counsel prior to interrogation by the State, the circumstances surrounding Smith's "waiver" of his right to counsel, whether Smith's confessions were coerced, and the State's interference with counsel's attempt to effectively represent Smith during the interrogation. Substantial questions also remain concerning the reasonableness of counsel's decision not to move to suppress the confessions and the soundness of numerous other actions that counsel took (or failed to take) in Smith's defense.

Smith has not procedurally defaulted on his claims of ineffective assistance of counsel. These allegations were raised at each previous proceeding at which Smith had an opportunity to challenge his coun-

sel's effectiveness. Nor is the State correct in its argument that Smith's petition did not state a basis for the relief granted by the Eleventh Circuit. To the contrary, both the district court and the Eleventh Circuit ruled that Smith's petition adequately set forth facts that, if true, would state a basis for granting the writ of habeas corpus. These courts were correct. The petition describes in great detail the ineffective assistance alleged and the prejudice that resulted from counsel's actions. The writ of certiorari should be denied.

## ARGUMENT

### I. THE ELEVENTH CIRCUIT CORRECTLY RULED THAT AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE SMITH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The State completely misses the point of the decision below. The Eleventh Circuit has done nothing more than decide that it needs an evidentiary hearing before it rules on Jimmy Lee Smith's allegations of ineffective assistance of counsel. Largely skirting the narrow issue of whether an evidentiary hearing is necessary, the State prematurely directs this Court to the merits of Smith's underlying Fifth, Sixth and Fourteenth Amendment claims.

The State faces a heavy burden in this petition. It must convince this Court that Smith could not prove he was denied effective assistance of counsel

under any conceivable set of facts consistent with the allegations in his petition. The Eleventh Circuit correctly rejected the State's approach by holding that a ruling on the substantive issues in this case should await the development of a complete factual record.

The State's brief also misperceives the purpose of the writ of certiorari. The writ is designed to enable this Court to resolve substantial unanswered federal questions or to settle important conflicts between the circuits. The writ does not serve as a second appeal. The Eleventh Circuit's decision to require an evidentiary hearing hardly represents a substantial issue worthy of the limited resources of this Court. Nor does the decision present a conflict. Indeed, the State's brief often leaves this Court to guess the names of the cases that allegedly conflict with the Eleventh

Circuit's decision below. Incredibly, none of the conflicts suggested by the State concern the ultimate issue in this proceeding, the grant or denial of an evidentiary hearing. The State's application for the writ of certiorari should be denied.

### A. An Evidentiary Hearing Is Needed To Test Smith's Claims That He Was Unconstitutionally Denied Effective Assistance of Counsel.

Smith's habeas corpus petition alleges that his appointed public defender failed to provide him effective assistance of counsel at the guilt-innocence and sentencing phases of his trial. Smith's claim is primarily based upon his counsel's failure to move to suppress the admission at trial of four (4) confessions secured by the State while Smith was in custody and after counsel had been appointed to represent him. To succeed in

his petition, Smith must prove that his appointed counsel erred (by showing that the confessions were in fact suppressible), that he was prejudiced by counsel's error, and that counsel's failure to move to suppress the confessions was not reasonable trial strategy. Strickland v. Washington, 466 U.S. 668 (1984). The State's argument primarily addresses the first of these issues, the underlying suppressibility of the confessions.[2] (Pet. at 13-19).

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[2] As to the issue of whether the failure to move to suppress was reasonable trial stragegy, both the District Court and the Eleventh Circuit agreed that the reasonableness of counsel's decision could be determined only after an evidentiary hearing. (See A. 42-44, 96, 98-99). The State does not argue this point other than to say that the strategy question can be resolved solely by reference to trial counsel's self-serving affidavit. See 21-24, infra. On the issue of whether Smith was prejudiced by the failure to suppress, the State notes in its statement of facts that the Eleventh Circuit and the Supreme Court of Florida disagree about

Four confessions were entered into evidence against Smith at his trial. The facts show that the earliest confession offered as evidence against him was secured May 5, 1978 at approximately 12:10 p.m. (RV 3, 23; RV 4, 392, 395).[3] Prior

---

whether Smith would have been convicted in the absence of the confessions. However, other than to note that disagreement in its factual statement, the State does not argue that the Eleventh Circuit's disagreement forms a basis for granting the writ. The prejudice issue is a mixed question of law and fact and therefore the Eleventh Circuit is not subject to rulings of the Supreme Court of Florida or the District Court on the subject. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, 700 (1984). In any event, the Eleventh Circuit is correct. In the absence of the confessions, the State's case is entirely circumstantial. The State had no alternative evidence of premeditation to support a conviction for first degree murder (A. 37-40). Moreover, the Supreme Court of Florida completely overlooked the fact that the only evidence supporting the death penalty was contained in the confessions. Certainly, Smith has been prejudiced by the wrongful imposition of a death sentence.

[3] An earlier confession was obtained on May 4, 1978, but it was never entered into evidence against Smith. Thus, noth-

to that confession, Smith had attended two first appearances before a Magistrate. Smith unequivocally invoked his right to counsel at each of those hearings (A. 124, 132). The affidavit of trial counsel submitted by the State (the "State's Affidavit"), shows that Smith had counsel appointed for him as early as May 3, 1978 (A. 109-112). According to the State's Affidavit, by the time of the May 5, 1978 confession, trial counsel had established an attorney-client relationship with Smith and had visited him at the jail on May 2, 3, and 4 (A. 108-113).

Smith's interrogators knew that he had invoked his right to counsel, yet the State's Affidavit shows that the State initiated further questioning of Smith in the absence of appointed counsel (RV 3, 7; A. 110). Smith alleges that the confessions elicited during this question-

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ing is known about the circumstances surrounding the first confession (A. 44-45).

ing in the absence of counsel were unconstitutionally coerced. (Petition at 14, 15, 44, 45).

Smith had the right to have counsel present during the State's interrogations. Miranda v. United States, 384 U.S. 436 (1966). Interrogation of an accused without assistance of counsel is inherently coercive. According to this Court, "compulsion" is inherent in custodial surroundings. Miranda at 439. See Rhode Island v. Innis, 446 U.S. 291 (1980); Michigan v. Mosley, 423 U.S. 96 (1975). Thus, where an accused invokes his right to have counsel present during custodial interrogation, interrogation must cease until counsel is provided. Edwards v. Arizona, 451 U.S. 477 (1981). According to Edwards, a confession obtained from a defendant after a request for counsel violates a defendant's Fifth, Sixth, and

Fourteenth Amendment rights to have counsel present.

The State argues that any procedural error in the State's questioning was waived by Smith. However, the inherently coercive nature of custodial interrogation imposes a heavy burden upon the State to demonstrate the voluntary nature of the waiver of privileges against the self-incrimination and the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Whether the confession is voluntary depends on whether it is the product of an essentially free and unconstrained choice by the accused. Johnson, 304 U.S. at 464.

To rule on Smith's habeas petition, the court must determine whether the State coerced Smith's confessions.[4] It is

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[4] The question of the voluntariness of the confession concerns a matter of law

impossible to make that determination on the evidentiary record as it now exists. According to the Eleventh Circuit, the following substantial fact questions must be resolved before the suppressibility issue can be reached:

(1) Was the May 4, 1978 confession coerced and, if so, had the coercion dissipated by the time of the subsequent confessions? There are virtually no facts in the record concerning the critical initial confession. Indeed, the fact that the State chose not to seek the admission of that confession into evidence indicates that even the State may have had questions regarding its admissibility. While proof that an initial confession is improper will not automatically invalidate subse-

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that is subject to complete review by the Eleventh Circuit. Miller v. Fenton, ___ U.S. ___, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

quent confessions, subsequent confessions must be excluded if coercion following the first statement had not dissipated at the time of subsequent statements. United States v. Bayer, 331 U.S. 532, 541 (1947). Here, the confessions that were introduced into evidence took place in rapid sequence following the May 4 confession (A. 8). The grouping of the confessions raises the fact question of whether the taint of the first confession infected the later confessions. See Oregon v. Elstad, ___ U.S. ___, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) ("the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements").

(2) Did Smith's counsel instruct the State not to interrogate Smith in counsel's absence? If not, why not? Smith's trial counsel had several conversations

with the interrogators. The record does not reveal what the interrogators told counsel. There is nothing in the record to indicate what instructions, if any, trial counsel gave the interrogators about questioning Smith. Nor, if there were no instructions, does the record reveal why counsel did not instruct the interrogators to cease their ex parte interrogation of Smith. Had defense counsel requested a termination of the interrogation in his absence, the State's initiation of additional questioning would violate Smith's Fifth, Sixth, and Fourteenth Amendment rights to counsel. See Brewer v. Williams, 430 U.S. 387 (1977).[5]

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[5] The State's reliance on Moran v. Burbine, 54 U.S.L.W. 4265 (March 11, 1986) is misplaced. Moran was decided by this Court on the basis of a full evidentiary hearing. Thus, in Moran, the circumstances surrounding counsel's attempt at contact and the defendant's waiver were fully understood. Indeed, the defendant

(3) Did Smith receive Miranda warnings during the interrogations? The record does not reveal whether the interrogators properly advised Smith of his Fifth Amendment right to remain silent and of his right to the presence of counsel during questioning as required under Miranda v. Arizona, 384 U.S. 436 (1966).

(4) Did the State honor Smith's right to remain silent if it was invoked? If Smith was advised of his rights, the record is silent as to whether he invoked those rights. The question is "whether his 'right to cut off questioning' was

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in Moran conceded that his confessions were given voluntarily (aside from the question raised by his ignorance of counsel's attempt to contact him). Moran's claims were also rejected because his right to counsel had not yet attached at the time of the interrogation. By way of contrast, an evidentiary hearing is needed in this case to determine if Smith's right to counsel had attached at the time of the confessions (A. 48-53).

'scrupulously' honored." Michigan v. Mosley, 423 U.S. 96 (1975).

(5) Was counsel's decision not to move to suppress the confessions reasonable trial strategy? The record is virtually silent on the critical issue of whether counsel's choice not to move to suppress the confessions was a reasonable strategic decision. Other than the untested affidavit of counsel, the facts concerning the reasonableness of trial counsel's strategy remain undeveloped.

In the words of the Eleventh Circuit, "these are but a few of the factual questions which must be resolved before we can address the issue of whether Smith received ineffective assistance of counsel at the guilt-innocence phase of his trial" (A. 52). This Court has held that an evidentiary hearing is required whenever crucial facts are not developed at the state court level. Townsend v. Sain, 372

U.S. 293 (1963). Because the crucial facts remained undeveloped, the Eleventh Circuit correctly determined that an evidentiary hearing on the Strickland ineffective assistance claim was necessary.

Smith has also alleged that his trial counsel's overall performance was so deficient that prejudice should be presumed under the standard enunciated in United States v. Cronic, 466 U.S. 648 (1984).[6]

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[6] Smith contends that his trial counsel was deficient in several respects, including: (1) failing to conduct an adequate voir dire of prospective jurors consistent with the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968); (2) failing to investigate and present evidence of Smith's mental state at the time of the alleged murders; (3) failing to inform the trial court that Smith had attempted suicide while in jail pending trial, and thus, pursuant to his physican's instructions, Smith was taking Psychotropic medication while awaiting trial, and of other evidence tending to show that Smith was incompetent; (4) failing to request a competency hearing under Pate v. Robinson, 383 U.S. 375

The Eleventh Circuit ruled that the Cronic claims, like Smith's Strickland claims, could not be addressed until the facts were further developed. For example, the record contains no explanation of trial counsel's decisions and, consequently, it is impossible to determine whether those decisions were reasonable strategic decisions or mere inadvertence. The Eleventh Circuit concluded:

> Prejudice is presumed under the Cronic analysis. The emphasis, therefore, is upon the circumstances under which counsel performed or whether counsel performed in a truly adversarial manner. Here, as under the Strickland analysis, the facts must be more fully developed before we can determine whether

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(1966); (5) failing to investigate and present mitigating evidence at the penalty phase of Smith's trial; and (6) stipulating to the admission of a videotaped confession of Smith clothed in prison garb during the penalty phase in violation of the precepts of Estelle v. Williams, 425 U.S. 501 (1976).

> Smith has met his burden of proof under Cronic.

(A. 56-57).

The failure to develop facts cannot be attributed to Smith. The Eleventh Circuit accurately noted that Smith had requested an evidentiary hearing, along with the State, when the ineffectiveness claim was first presented to the state trial court in March, 1983. Similarly, Smith requested an evidentiary hearing before the District Court in July, 1984. Even the District Court noted that an evidentiary hearing would have been helpful:

> I think it would have been preferable to have held an evidentiary hearing at the trial court level. I certainly would encourage state trial judges to do so, because it would alleviate a lot of the concern that comes before federal judges when the matter gets to this almost critical stage.

Smith v. Wainwrignt, (N.D. Fla. July 11, 1984) (A. 99).[7]

Petitioner contends that the unrebutted affidavit of trial defense counsel should negate an evidentiary hearing into counsel's alleged ineffectiveness. However, as a result of the circumstances under which counsel's affidavit was prepared, filed, and presented, reliance on the affidavit would be procedurally unsound and fundamentally unfair.

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[7] The Florida Supreme Court and the district court denied the requests for an evidentiary hearing, not because factual development was unnecessary, but because they erroneously determined that Smith was not prejudiced by the admission of the four confessions. The Eleventh Circuit disagreed, correctly noting that the State's evidence was otherwise weak and circumstantial. Moreover, there was no evidence outside the confessions to support a conviction for first degree murder or to prove the aggravating circumstances necessary for the imposition of the death penalty (A. 37-40).

Smith's first petition for writ of habeas corpus to be considered on the merits was filed on Monday, July 9, 1984, in the United States District Court for the Northern District of Florida. On that same day, trial defense counsel executed his affidavit. The affidavit and the State's motions to dismiss and for summary judgment were contemporaneously served on Smith's counsel on the next day, July 10, 1984. The District Court held a hearing on the petition on the following day, July 11, 1984. After oral argument, the Court dismissed the petition. However, in the process of ruling on the petition, the District Court noted that Smith had no opportunity to respond to the affidavit:

> The State has filed an affidavit. There is some question as to how that affidavit should be considered by the court. For purposes of summary judgment proceedings obviously Smith's attorneys have not had an opportunity to at least

> respond to the affidavit in some way, but I find the affidavit is properly filed with the Court. But I'm not going to consider it for purposes of ruling either on a motion to dismiss or a motion for summary judgment.

Smith v. Wainwright, (N.D. Fla., July 11, 1984) (A. 97).

The District Court's decision not to consider the affidavit in the context of a motion for summary judgment or a motion to dismiss is correct. Rule 11, Rules Governing Section 2254 Cases, provides that:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate to petitions filed under these rules.

Rule 56(c), Federal Rules of Civil Procedure, which governs summary judgment procedures, states in pertinent part that: "The motion shall be served at least ten (10) days before the time fixed for the hearing." In this case the affidavit and

motions were served the day before the hearing. This procedural infirmity is not an unimportant technicality, but a critial element which incorporates due process considerations. See Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387, 391-2 (5th Cir. 1980); Hanson v. Polk County Land, Inc., 608 F.2d 129, 131 (5th Cir. 1979). The Eleventh Circuit agreed:

> Assertions in affidavits are a far cry from assertions made under circumstances which subject them to probing cross-examination.

Smith, at A. 213. The evidentiary hearing ordered by the Eleventh Circuit will provide Smith with his first opportunity to present testimony to rebut trial defense counsel's affidavit and to prove Smith's allegations of ineffective assistance of counsel.

Finally, the State contends that Smith's pervasive lack of cooperation was the sole reason for trial defense counsel's ineffective assistance and thus there is no need for an evidentiary review of Smith's claims under United States v. Cronic, 466 U.S. 648 (1984). The State's claim is self-defeating. To the extent it wishes to rely on Smith's interference with counsel, the facts are woefully underdeveloped. Here, the evidentiary hearing requested by the Eleventh Circuit will delve not only into the facts which are supportive of Smith's claims, but will also explore the State's claims regarding Smith's uncooperative behavior.

Furthermore, the State's legal argument is defective. In essence, the State is arguing that Smith waived his right to counsel at the guilt-innocence phase of trial. See Petition at 42. This Court's decision in Faretta v. California, 422

U.S. 806, 835-36 (1975), requires a "knowing and intelligent" relinquishment of the right to counsel. At the guilt-innocence phase of the trial, there was no de facto waiver, much less a waiver in which the court participated and advised Smith of his rights. The State has cited no case which holds that waiver can be established by defendant's hindrance of counsel. Even if hindrance could constitute a waiver, the State offers no explanation for counsel's failure to notify the court of these "impediments" or to withdraw if effective representation was impossible.

In any event, the deficiencies that Smith cites to support his Cronic ineffectiveness arguments could not conceivably have been caused by Smith. See n.6, supra. Smith is not responsible for counsel's defective voir dire. Smith did not control counsel's faulty investigation of Smith's mental background. Smith did not

order his counsel not to reveal the fact of Smith's attempted suicide or the fact that he was taking psychotrophic drugs while awaiting trial. Smith did not instruct his counsel not to request a competency hearing under Pate v. Robinson, 383 U.S. 375 (1966). Smith did not ask his counsel to stipulate to the admission of a videotaped confession of Smith clothed in prison garb during the penalty phase in violation of the principles of Estelle v. Williams, 425 U.S. 501 (1976).

The Eleventh Circuit clearly and definitively decided that the existing record in this case failed to develop the material facts necessary to evaluate respondents' Strickland and Cronic claims. The failure to adequately develop the facts is attributable neither to neglect nor deliberate bypass. Accordingly, the Eleventh Circuit correctly held under the precepts of this Court's ruling in

Townsend v. Sain that an evidentiary hearing was required before proceeding to the merits of Smith's claims.

### B. Smith Has Not Procedurally Defaulted On His Ineffective Assistance Of Counsel Claims.

The State incorrectly maintains that Smith is procedurally barred from raising the ineffectiveness of counsel issue by Wainwright v. Sykes, 433 U.S. 72 (1977). Under Wainwright v. Sykes, Smith is barred to the extent he failed to raise the ineffectiveness issue in the appropriate proceeding below. However, Smith has sought review of the effectiveness of his trial counsel at each stage of collateral review. The issue was raised in Smith's first petition for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Smith unsuccessfully appealed that unfavorable disposition to

the Supreme Court of Florida. Smith v. State, 445 So.2d 323 (Fla. 1983). Smith again raised the issue in his habeas corpus petition to the District Court for the Northern District of Florida. He raised the issue again in the Eleventh Circuit Court of Appeals and was finally granted the evidentiary hearing which he had sought every step of the way. It is absurd to suggest that Smith has defaulted on the ineffectiveness claim.

The State's brief confuses the ineffectiveness of counsel issue with the underlying suppressibility of the confessions. Smith's counsel did procedurally default on the suppression issue by failing to object to the admission of the confessions at trial. Thus, only if Smith were attempting to litigate the underlying suppressibility issue itself, would the Eleventh Circuit Court of Appeals have been obligated to test

Smith's claims under the Wainwright v. Sykes criteria.[8]

Here, Smith's claim encompasses far more than the suppression issue. Smith

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[8] Even under Wainwright v. Sykes, if Smith can prove cause and prejudice he can litigate the underlying suppression issue. Several circuits, including the Eleventh Circuit, have held that the cause requirement of Wainwright v. Sykes is satisfied when counsel is found to be ineffective and the procedural default was a result of that ineffectiveness. See Birt v. Montgomery, 725 F.2d 587, 597 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984). See also Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), on rehearing, 623 F.2d 929, cert. denied, 450 U.S. 1001 (1981); Boyer v. Patton, 579 F.2d 284, 287-88 (3d Cir. 1978).

This Court granted certiorari to review a similar ruling in Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985), cert. granted, ___ U.S. ___, 105 S.Ct. 3523, 87 L.Ed.2d 649 (1985). However, the Fourth Circuit there allowed a claim of ineffectiveness that did not violate a defendant's Sixth and Fourteenth Amendment rights to constitute "cause" within the meaning of Wainwright v. Sykes. Smith has alleged (and the Eleventh Circuit requires) a showing of ineffectiveness that rises to the level of a constitutional violation. Birt, 725 F.2d at 597.

asked the Eleventh Circuit Court of Appeals to remand for an evidentiary hearing on his claim that he was denied effective assistance of counsel under Strickland v. Washington. No doubt the suppressibility of the confessions is one element of Smith's ineffectiveness claim. However, counsel's error on the suppression issue is but one of several elements that must be proven by Smith to prevail. Moreover, Smith has raised ineffectiveness claims under the Cronic standard. The suppression issue forms only a minor portion of the many issues supporting Smith's Cronic claim.

Apparently, the State wishes to overlay the requirements of Wainwright v. Sykes onto the requirements of Strickland v. Washington. Thus, the State would eliminate all avenues for review of counsel's performance where counsel's ineffectiveness caused a prodedural

default. In effect, federal courts would be placed in the untenable position of having the ability to review bad decisions of counsel while being precluded from review when counsel has failed to act altogether.

Federal courts have not reached such an absurd conclusion. Where ineffective assistance of counsel claims have been raised and properly preserved, as in this case, the federal courts have not looked to Wainwright v. Sykes as preliminary to review on the Strickland or Cronic ineffectiveness claims. In Gray v. Greer, 778 F.2d 350 (7th Cir. 1985), the Seventh Circuit Court of Appeals analyzed a claim under Strickland that appellate counsel was ineffective in failing to file an appeal, resulting in default on a significant constitutional claim. As in this case, the court held that analysis under Wainwright v. Sykes was unnecessary to the

analysis of the ineffectiveness issue because it had been properly preserved. In Johnson v. Blackburn, 778 F.2d 1044 (5th Cir. 1985), the Fifth Circuit Court of Appeals clearly distinguished between the underlying defaulted claim (which concerned faulty jury instructions) and the defendant's complaint that counsel's failure to object to those instructions constituted ineffective assistance. Id. at 1048. The ineffective assistance of counsel claim was analyzed independently under the Strickland test and was not barred by Wainwright v. Sykes. Id. at 1048-49.[9]

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[9] The issue here should be distinguished from that presented in Morrison v. Kimmelman, 752 F.2d 918 (3d Cir.), cert. granted, ___ U.S. ___, 106 S.Ct. 59, 88 L.Ed.2d 47 (1985). Kimmelman concerns a defendant's right to argue that ineffectiveness of counsel was to blame for the failure to exclude evidence obtained in violation of the Fourth Amendment. A defendant is prohibited under Stone v.

The Eleventh Circuit below was not misled by the state's attempt to turn Smith's claim of ineffective assistance of counsel into a claim on the underlying

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Powell, 428 U.S. 465 (1976), from raising a Fourth Amendment claim in the context of habeas relief. Stone was based on this Court's determination that the privacy interests protected by the Fourth Amendment were too remote from the point where federal review occurs to warrant the intrusion into the judicial process that would result from habeas review. Id. at 482-83. Even if this Court extends the reach of Stone to ineffective assistance claims, the analogy should not be drawn to ineffective assistance claims based on underlying Fifth and Sixth Amendment violations. Those Amendments are not based upon remote privacy interests but instead preserve the integrity of the criminal process itself.

Even if this Court reversed Kimmelman and decided in the context of this "interlocutory" proceeding to apply its logic to the Fifth and Sixth Amendment claims asserted here, an evidentiary hearing would still be necessary on Smith's Cronic claims where default is not an issue.

issue of the suppression of the confessions. Smith is not in procedural default on his Strickland and Cronic ineffective assistance claims.

### C. Smith's Petition For Habeas Corpus Presents A Sufficient Predicate For The Relief Granted By The Eleventh Circuit Court Of Appeals.

Both the district court for the Northern District of Florida and the Eleventh Circuit Court of Appeals found that Smith's Petition for Habeas Corpus relief pleaded sufficient detail of counsel's ineffective acts and omissions to warrant the finding of ineffective assistance.[10]

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[10] The district court's oral order stated that "the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in an appropriate pleading. I find that that has been done here" (emphasis added) (A. 94).

Upon review of Smith's allegations, the Eleventh Circuit expressly concluded

In their analyses of Smith's right to effective counsel under Strickland v. Washington, the two courts differed only on the issue of whether the ineffective assistance of counsel actually prejudiced Smith.[11] Despite the clear holdings of the courts below, the State now claims that Smith's petition was insufficient.

To the contrary, the sixty-page petition sets forth specific allegations that, if true, support a finding of ineffective assistance of counsel. The Petition for Writ of Habeas Corpus alleges substantive facts which show that Smith's inculpatory

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that the "allegations, if true, are sufficient to state a constitutional violation" (A. 32).

[11] While the district court claimed to be ruling on the State's Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, the order clearly reflects a reliance on the underlying record in its determination that no prejudice resulted. Therefore, in effect, the court's ruling is in the nature of a Rule 56 summary judgment.

statements were suppressible, that his trial counsel failed to move to suppress those statements, and that such failure worked to his prejudice at trial.[12]

The fact finding ordered by the Eleventh Circuit directly related to those allegations in the petition. The State's insufficient pleading argument is without merit and should be rejected.

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[12] Relevant allegations are found in paragraphs 22-25, 50-51, 99-104, and 111-112 of the Petition for Habeas Corpus.

## CONCLUSION

For all the foregoing reasons the State's petition for writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

CASE NO. 85-1793

October 1985 Term

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,

Petitioner,

vs.

JIMMY LEE SMITH,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

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# REPLY BRIEF

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## ARGUMENT

Louie L. Wainwright stands on the legal arguments advanced in his petition for writ of certiorari. He files this reply brief solely to address an argument first raised by Respondent Jimmy Lee Smith concerning Issue II[1] in his response in opposition to said petition. Rule 22.5, Rules of the Supreme Court of the United States.

Smith claims that whenever a state prison superintendent opposes a federal petition for writ of habeas corpus and motion for a stay of execution by appending a verified affidavit to a motion for summary judgment, Rule 56(c) of the Federal

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ISSUE II:

MAY AN UNREBUTTED AFFIDAVIT FROM TRIAL DEFENSE COUNSEL NEGATE THE NEED FOR AN EVIDENTIARY HEARING INTO HIS ALLEGED INEFFECTIVENESS UPON PETITION FOR WRIT OF HABEAS CORPUS?

Rules of Civil Procedure requires that a hearing upon such motion may not be scheduled for less than 10 days following its service, in order to afford the prisoner adequate time to submit a counter-affidavit (Resp. at 21-24). Given that a Florida death warrant may generally be carried out for only a brief period roughly one month after it is signed by the Governor,[2] the logical upshot of Smith's position is that a Florida death-sentenced inmate such as himself can deprive the government of its right to effectively rely upon affidavits as authorized by Blackledge v. Allison, 431 U.S. 62 (1977) merely by delaying a federal district court challenge to his execution until less than 10 days before the scheduled date.

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[2] See Chapter 922, Florida Statutes.

Several courts, including the court below, Smith v. Wainwright, 777 F.2d 609, 616-617, note 6 (11th Cir. 1985), have had difficulty recognizing the fact that the Federal Rules of Civil Procedure are not strictly applicable to habeas corpus proceedings. See McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982) and Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983).[3]

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[3] Hill v. Linahan holds that Rule 56(c) requires that a state habeas corpus petitioner must be given 10 days to respond to a prison superintendent's responsive pleading if it even so much as incorporates the state court trial record, which is an absolute necessity to defending most habeas actions. May a death row inmate permanently forestall his execution simply by filing his habeas petition in the federal district court less than 10 days before the scheduled date and then invoking Rule 56(c) when the government files a responsive pleading appending the state court record? This preposterous result is what Linahan and the decision below collectively suggest.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts discretionarily provides that these rules "may be applied, where appropriate." This language comports with this Court's holding of Harris v. Nelson, 394 U.S. 286 (1969) stressing the traditional informality of, and district judge discretion over, habeas corpus proceedings. See also Dillard v. Blackburn, 780 F.2d 509 (5th Cir. 1986). Strict application of the Federal Rules of Civil Procedure to habeas corpus cases would seriously disadvantage the vast majority of habeas corpus petitioners, who unlike respondent do not enjoy the assistance of counsel.

Wainwright would agree that a habeas corpus petitoner such as Smith should ordinarily be entitled to submit counter-affidavits to those contained in a prison superintendent's response, regardless of

whether this entitlement arises pursuant to Rule 7(c) of the Rules Governing Section 2254 Cases in the United States District Courts, Rule 3(F) of Rules of the United States District Court for the Northern District of Florida, and 28 U.S.C. §2246, or pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts and Federal Rule of Civil Procedure 56 as Smith contends. But ordinarily, even assuming a district court judge issued and the government received an order to show cause simultaneously to the filing of a habeas petition, which is problematic,[4] the government would have a minimum time of at least 3 and very argua-

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[4] See generally Federal Rule of Civil Procedure 6(e).

bly 20 or more full days to respond.[5] Moreover, if the government submitted an affidavit and moved for a summary judgment, arguably at least 5 or 10 more days would pass before the judge could hold a hearing,[6] and legally afford the prisoner any relief. Here Smith inexcusably delayed in filing his petition for writ of habeas corpus with Judge Roger C. Vinson of the Federal District Court for the Northern District of Florida until 9:00 a.m. on July 9, 1984, less than 3 full days before his scheduled 7:00 a.m. July 12 execution in a transparent abuse of the writ as pled below. See Autry v. Estelle, 719 F.2d 1247 (5th Cir. 1983) and Stephens v. Kemp, 721

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[5] See 28 U.S.C. §2243 and Federal Rules of Civil Procedure 12(a-c).

[6] See 28 U.S.C. §2243 and Federal Rule of Civil Procedure 56(c).

F.2d 1300 (11th Cir. 1983), cert. denied, 469 U.S. 1043 (1984).[7] It follows that Smith necessarily waived as a matter of law all of the applicable rules, including those ordinarily securing the right to submit counteraffidavits, in order to prevent Wainwright from finding himself in a situation whereby he could arguably have lawfully carried out the warrant simply by withholding his response until the deadline. See generally Barefoot v.

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[7] This Court denied certiorari over the denial of Smith's first Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief on May 29. Smith v. Florida, 467 U.S. 1220 (1984). Smith's second death warrant was signed on June 15. Smith did not file anything with any court until July 9, at which time he filed in both the state and federal courts.

Wainwright does not fault opposing counsel, whom he respects, for adopting this tried and true eleventh hour approach. Wainwright does, however, look forward to the day when such an approach will not be rewarded by the judiciary.

Estelle, 463 U.S. 880 (1983). Having waived the applicable rules in order to compel Wainwright's response and be heard by Judge Vinson, Smith was in no position to then inconsistently insist upon their enforcement. Cf. Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975).

Even if the Federal Rules of Civil Procedure are strictly applicable to habeas corpus proceedings, Federal Rule of Civil Procedure 1 provides that they "shall be construed to secure the just, speedy and inexpensive determination of every action." Respondent employed Rule 56(c) to opposite effect in the instant case. Wainwright simply cannot believe that the Eleventh Circuit's toleration of Smith's skillful manipulation of our criminal justice system, Smith v. Wainwright, 777 F.2d 609, 616-617, note 6, reflects the law of this land. He would respectfully ask this Court

to grant certiorari here to clarify that it does not. Rules 17.1(a) and (c), Rules of the Supreme Court of the United States.

## CONCLUSION

WHEREFORE petitioner, Louie L. Wainwright, as Secretary of the Florida Department of Corrections, respectfully submits that this Honorable Court should GRANT his petition for writ of certiorari and REVERSE that portion of the Eleventh Circuit's decision mandating an evidentiary hearing into the competence of trial counsel with directions that the decision of the Federal District Court for the Northern District of Florida denying all relief be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a total of three true copies of the foregoing "Petitioner for Writ of Certiorari...Reply Brief" have been forwarded to Ms. Sarah M. Bleakley, 1529 Coombs Drive, Tallahassee, FL 32308, Mr. Julian Clarkson, Law Offices of Holland and Knight, P.O. Drawer 810, Tallahassee, FL 32302, and Mr. Gregg D. Thomas, P.O. Box 1288, Tampa, FL 32202, Attorneys for Respondent, by U.S. Mail this 9th day of June, 1986.

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